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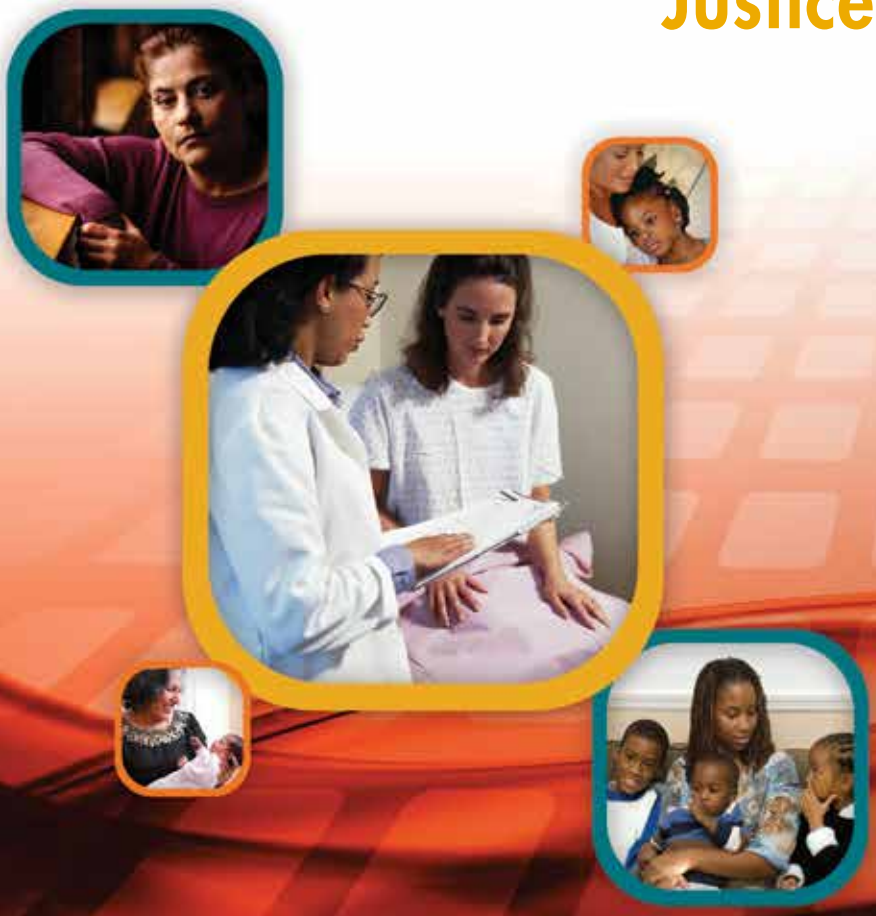
Pregnancy- and Child-Related Legal and Policy Issues Concerning Justice-Involved Women



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Pregnancy- and Child-Related Legal and Policy Issues Concerning Justice-Involved Women

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The contents of this document reflect the views of Myrna S. Raeder, J.D. The contents do not necessarily reflect the official views or policies of NIC.

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Foreword

The potential for legal liability looms large for correctional administrators in prison, jail, probation, and parole settings. Although "litigation is always a possibility regardless of its ultimate likelihood of success, positive outcomes are more likely when legal issues have been anticipated and administrators can articulate appropriate reasons for the policy, practice or conduct in question."[1]

As the number of women under some form of correctional custody increases, administrators are tasked with establishing policies and practices around myriad issues that are unique to or occur with greater frequency with women in the correctional system. In 2003, the National Institute of Corrections published *Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders* as the result of a multiyear project aimed at creating a foundation for administrators and practitioners to manage justice-involved women effectively. That document's appendix provided a legal overview of issues that affect women offenders, such as equal protection and access to facilities, programs, and services; staffing and supervision; sexual misconduct; due process challenges; and pregnancy- and child-related questions. This document—the first of a two-part series on legal issues affecting corrections with regard to justice-involved women—builds upon that appendix. It specifically focuses on reproductive health issues; pregnancy management, particularly with regard to obstetrics and gynecological health issues; pregnancy-related security considerations; visitation; the effect of parental incarceration on both the incarcerated mother and child; and how these issues must inform reentry planning.

While many of these issues affect a small percentage of the overall corrections population, they may contribute to an increased outlay of resources, particularly with regard to reproductive, obstetrical, and gynecological issues. As with most correctional challenges, there is no one "right" way to deal with these types of issues. Because of changes in established practices and needed resources, corrections officials tasked with developing strategies to address these issues should collect data and analyze research from various sources and may look to case law and legal decisions for additional guidance. This document aims to assist administrators in developing policies and practices to address the issues common in female offender populations by providing the legal framework in which authorities made decisions and the contextual information around those decisions. It is hoped that this document will be a useful resource in developing new policies and practices.

Morris L. Thigpen
Director, National Institute of Corrections

Introduction

This document provides an overview of pregnancy- and child-related legal questions concerning justice-involved women that can be raised in correctional settings. It updates and expands the Legal Appendix, written by Southwestern Law School Professor Myrna Raeder, that is included in *Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders,* by Barbara Bloom and colleagues, published by the National Institute of Corrections (NIC) in 2003.[1] The information presented here is expected to be pertinent to a wide audience, only some of whom have legal training. Commissioners of correctional departments and their legal staff, wardens, sheriffs, and other prison and jail administrators; community correctional officials; service providers; and stakeholders, including advocates for inmates, should all be able to reference this document as a starting point for analyzing family issues that affect a large percentage of female inmates. A variety of resources, legal and otherwise, are cited to help further research about these issues. Administrators and policymakers may find it useful to review their policies in light of these pregnancy- and child-related legal questions and answers, with the caveat that their responses must be dictated in part by the specific laws and policies that exist in the particular jurisdiction where their facility is located, and by the specific circumstances of each issue that arises.

Approximately 200,000 women are currently incarcerated in the United States, with nearly half confined in jails. Surveys of incarcerated females typically report that about 5 percent are pregnant when they enter local jails and state prisons, with a slightly lower percentage reported for federal prisoners. Although there is not a precise count of how many children are born to incarcerated women each year, it is not uncommon to hear estimates of several thousand births. In particular, legal issues concerning prenatal care, the shackling of pregnant women in childbirth, and restricted access to elective nontherapeutic abortions have received media attention and generated litigation.

Beyond the legal questions raised by pregnancy, the vast majority of female offenders are mothers of minor children, and their behavior during incarceration can be dramatically affected by concerns about their children and the nature of their relationship with them. Correctional officials have control over some child-related issues regarding visitation and programs that satisfy requirements of reunification plans, which may be key to motivating women to engage actively in rehabilitative efforts. However, other child-related issues, such as termination of parental rights or housing women in facilities close to their homes, may be outside an administrator's control. Maintaining relationships can be particularly difficult for women who are placed in facilities far from their families, and worrying about losing their parental rights can have detrimental effects on the mental outlook of incarcerated mothers.

The Bangkok Rules for Treatment of Women Prisoners, recently adopted by consensus by the General Assembly of the United Nations, set forth a number of provisions concerning pregnancy and children. They include considering a reasonable suspension of a mother's detention, taking into account the best interests of her children; favoring noncustodial sentences for pregnant women and women with dependent children, where possible and appropriate; and favorably viewing caretaking responsibilities for the purposes of granting early parole.[2] Although the rules are not directly enforceable in the United States, because they reflect a world consensus concerning treatment of women

prisoners and their children, it is expected that any U.S. practices or policies that are in conflict with them will be challenged on the grounds that they violate the human rights of female inmates. Even prior to the adoption of the Bangkok Rules, such claims were raised in relation to women who were shackled during childbirth (see chapter 2, "The Use of Restraints on Pregnant Inmates"). Similarly, the rules are likely to be cited in support of policy-based arguments that severe sentences for mothers of minor children who commit nonviolent crimes are out of sync with correctional policies in the rest of the world that attempt to mitigate the adverse effect of imprisonment on children by recognizing that female inmates are typically the sole or primary caretakers of their children.[3]

Understanding how family-based legal issues affect women offenders is important in designing programs to ensure the best outcomes for women and their children, not just in jail or prison settings but also in probation, parole, and community correctional settings. Keeping mothers and infants together is also important to a child's development because bonding is essential for children to be able to form attachments later in life. Therefore, it is important for correctional officials to encourage bonding in prisons and community correctional facilities. For example, the Federal Bureau of Prisons operates the Mothers and Infants Together program, which permits eligible women to reside in a community correctional setting with their infants for up to 18 months after giving birth. California has operated a Community Prison Mother Program, through which eligible inmates with less than 6 years remaining on their sentences may reside with their children in a residential facility, where they receive comprehensive programming to enable them to better reintegrate into their communities. Other states also operate residential programs for incarcerated mothers and their young children.[4]

Establishing a prison nursery is one way to accommodate the needs of female prisoners who are not eligible to reside with their infants in a community-based facility. Although prison nurseries[5] were once common, today fewer than 10 states operate such nurseries.[6] A recent evaluation of the Bedford Hills Correctional Facility prison nursery (funded by the National Institutes of Health) concluded that children can become securely attached in a prison setting, which can assist in reunification efforts when the female offender is released.[7] Denial of a prisoner's application to participate in a prison nursery or alternative programs may be subject to court review.[8]

Practically, the type and extent of community services available to inmate mothers—particularly those with young children—may affect their ability to meet the conditions of their release. Preparation while in prison is key to increasing the capacity of women offenders to deal with their family responsibilities in a way that ensures the best chance for their success upon release into the community. The current focus on the importance of reentry in reducing recidivism and the positive role that families play suggests greater awareness by correctional agencies and jails of the value of family-friendly policies and outreach to community and faith-based groups that can provide reentry resources.[9]

Chapter 1. The Framework for Addressing Legal Claims of Justice-Involved Women

The following overview of the Eighth Amendment and Section 1983 litigation is presented to facilitate a better understanding of the legal context in which most pregnancy- and child-related questions concerning justice-involved women arise. Where applicable, subsequent chapters provide more detailed analyses of the specific legal challenges being discussed.

Title 42 U.S.C. Section 1983 Litigation

Most lawsuits challenging pregnancy- and child-related issues will be based on 42 U.S.C. Section 1983, although, on occasion, state tort law may provide a remedy. Section 1983 claims require an allegation of a violation of the Constitution of the United States. States and state agencies are not "persons" who can be sued under Section 1983, and they also enjoy sovereign immunity under the 11th Amendment.[10] Similarly, state officials cannot be sued in their official capacity for monetary damages, which must be paid from public funds in the state treasury,[11] but they can be sued in their individual capacity. Practically, injunctive relief can be sought against state officials in their official capacity under Section 1983 to obtain future compliance with constitutional standards.[12] In contrast, municipalities—including counties, cities, unincorporated localities, and other local governmental units as well as local officials in their official capacities[13]—are "persons" suable under Section 1983. Actions against individual defendants in their official capacities are treated as suits brought against the government entity itself.

Section 1983 claims are typically predicated on violations of the 14th Amendment, which applies the Eighth Amendment ban on cruel and unusual punishment and the Fifth Amendment right to due process to the states. Because claims cannot be brought against the federal government under Section 1983, such suits are brought directly under the Eighth and Fifth Amendments and are called "*Bivens* actions."[14] A *Bivens* action is a claim against federal officials for violation of an individual's constitutional rights. Women who are detained in local jails but not convicted bring their claims under the due process rationale of the 14th Amendment pursuant to Section 1983 because they cannot be punished under the Eighth Amendment. However, most courts treat the difference in status (detained or convicted) as not affecting the Eighth Amendment analysis.[15]

To establish municipal liability, an official policy or custom must be alleged to deprive a person of a federally protected right. Failure to adequately train or supervise can be actionable if the policy was adopted with deliberate indifference to the known or obvious possibility that it would result in cruel and unusual punishment. A municipality must also have actual or constructive knowledge of the inappropriate practice before liability can be imposed against it.[16]

Eighth Amendment Analysis (Applied to the States by the 14th Amendment)

Demonstrating an Eighth Amendment violation requires both an objective and a subjective component.[17]

An injury is objectively and sufficiently serious, denying "the minimal civilized measure of life's necessities," if it—

- results in the "unnecessary and wanton infliction of pain,"
- is "grossly disproportionate to the severity of the crime warranting imprisonment," or
- results in an "unquestioned and serious deprivation of basic human needs."

An official has a sufficiently culpable state of mind demonstrating deliberate indifference when—

- the official knew of and disregarded an excessive risk to inmate safety or health,
- the official was aware of facts from which an inference could be drawn that a substantial risk of harm existed, and
- the official actually drew the inference.

It is not sufficient that the injury was grave enough that the official should have known of the risk, if that individual did not subjectively know of the risk. For example, when an inmate did not tell the guards she was offended and harassed by their verbal abuse, they did not have the requisite culpable state of mind.[18] *Helling* v. *McKinney* refined the distinct objective and subjective components for an Eighth Amendment claim, indicating that the objective prong "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwilling to [take] such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate."[19]

Whether a correctional supervisor can be found liable for an Eighth Amendment violation under Section 1983 is subject to a different analysis than that used for officers who are alleged to be responsible for claimed constitutional violations. In the absence of direct involvement by an administrator, in order to establish failure to ensure that proper policies and customs were implemented with respect to the right in question, an official "is only liable for his … own misconduct" and is not "accountable for the misdeeds of [his] agents" under a theory such as respondeat superior—or supervisor liability.[20] However, direct involvement can also result from a supervisor's failure to act.[21]

Qualified Immunity to Section 1983 Actions

Qualified immunity to Section 1983 actions was created to shield government officials from civil liability for the performance of discretionary functions, as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have knowledge.[22] Qualified immunity is available as a defense to public officials sued for damages in their individual capacity, unless the official has acted with an impermissible motivation or with such disregard of a person's clearly established constitutional rights that the action cannot be reasonably characterized as having been in good faith.[23] If a reasonably competent official knew or should have known that conduct was unlawful, immunity does not exist. It is important to recognize that qualified immunity is unavailable to local governmental entities under Section 1983, which means that a municipality may not assert the good faith of its officers as a defense to such liability.[24] However, as previously mentioned, municipalities may not be found liable for the acts or omissions of employees unless they are based on official policy or practice. Thus, in some instances, a local entity may be liable, but its employee is shielded by qualified immunity. Conversely, a state may not be liable for money damages, but an employee of the state who is sued in an individual capacity may, on occasion, not meet the criteria for qualified immunity though state law may permit indemnification.

Because the immunity is from suit rather than a mere defense to liability, denial of qualified immunity is immediately appealable to the extent that it turns on an issue of law[25] and may be appealed both at the dismissal and summary judgment stages of litigation.[26] If the decision is not immediately appealable because of the presence of a disputed factual issue, *Ortiz* v. *Jordan* has held that the only way a defendant can challenge the denial of summary judgment on qualified immunity grounds after a full trial is to raise the sufficiency of the evidence issue by a postverdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b).[27] It should be noted that qualified immunity will not necessarily win a Rule 12(b)(6) motion to dismiss because at that stage it is the defendant's conduct as alleged in the complaint that is scrutinized for "objective legal reasonableness."[28] The U.S. Supreme Court treated qualified immunity as an affirmative defense in *Gomez* v. *Toledo,*[29] which results in many qualified immunity claims being decided in summary judgment. Once the defendant pleads qualified immunity, the majority of circuits hold that the burden then shifts to the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct.[30] Judges will typically determine if there has been a violation of a constitutional right before determining if the right was clearly established at the time.[31] However, this two-step process is discretionary.[32]

Richardson v. *McKnight* clarified that prison guards who are employees of a private prison management firm are not entitled to qualified immunity from suit by prisoners charging a violation of Section 1983.[33] The Court left open whether a defense of good faith was available to private guards. In *Correctional Services Corp.* v. *Malesko,* the Court held there was no implied private right of action pursuant to *Bivens* for damages against private entities that engaged in alleged constitutional deprivations while acting under color of federal law.[34] More recently, *Minneci* v. *Pollard* held that federal prisoners could not assert an Eighth Amendment *Bivens* claim for damages against private prison employees but must rely on state tort law remedies.[35]

Chapter 2. The Use of Restraints on Pregnant Inmates

Is it legal to restrain a pregnant woman who is about to deliver, when doing so can endanger her or her child? Regardless of whether or not a constitutional violation can be established or the case is subject to a defense of qualified immunity, the use of such restraints in the absence of any security or flight risk is questionable from humanitarian, public relations, and litigation perspectives.

Recent Anti-Shackling Developments

Restraints on pregnant women have been the subject of worldwide attention for a number of years. In 2006, the United Nations Committee Against Torture alerted the United States that shackling during childbirth is a violation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is a party.[36] More recently, the American medical and legal communities have joined humanitarian groups in opposing this practice. The American Bar Association (ABA); the American College of Obstetricians and Gynecologists (ACOG); the American College of Nurse Midwives;[37] the American Public Health Association; the National Commission on Correctional Health Care; the Association of Women's Health, Obstetric and Neonatal Nurses; and the American Medical Association (AMA) have now condemned the shackling of women during childbirth, adding their voices to earlier protests against such practices by Amnesty International, Human Rights Watch, the American Civil Liberties Union (ACLU), and the United Nations Special Rapporteur on Violence Against Women. Similarly, in 2012, the American Correctional Association[38] (ACA) recognized that "the well-being of the unborn fetus/child is paramount when considering policies" regarding shackling of pregnant inmates. ACA policy prohibits waist restraints from being used during pregnancy at any time and severely restricts the use of leg restraints and electronic restraints.[39] Moreover, the United Nations' Bangkok Rule 24, adopted in December 2010, categorically states that "instruments of restraint shall never be used on women during labour, during birth and immediately after birth."[40] The AMA has used terms such as "barbaric" and "dangerous" to describe the practice. Advocacy groups have recommended legislation,[41] regulation, policies, and practices to reflect a commitment to protect inmates not only against the use of restraints in childbirth but also in the third trimester, during transportation, and during postpartum recovery.[42]

Although a majority of jurisdictions still do not have specific legislation regulating shackling during childbirth, the Federal Bureau of Prisons, U.S. Marshals, and approximately 21 states prohibit shackling during labor and delivery except when a substantial or compelling showing can be demonstrated that the woman is a security or flight risk.[43] This is a dramatic shift from 10 years ago when few explicit restrictions existed. More than 17 states have enacted statutes rather than relying on policy, and anti-shackling legislation has recently been introduced in several other states.[44] After a failed attempt to enact legislation in Virginia, the department of corrections agreed to introduce policy to the same effect. Media interest recently resulted in a change to Iowa's "confidential" policy on restraints, but legislation is also being sought.[45] Because there is now an identifiable national anti-shackling movement,[46] continuing attention to this issue can be expected.

Some states explicitly extend the ban to hospital transport and recovery, and a few states are considering strengthening their existing law. For example, in September 2012, California enacted Assembly Bill 2530, which prohibits inmates known to be pregnant or in recovery after delivery from being restrained by the use of leg irons, waist chains, or handcuffs behind the body. Pregnant inmates in labor, during delivery, or in recovery after delivery also cannot be restrained by the wrists, ankles, or both, unless deemed necessary for the safety and security of the inmate, the staff, or the public. The statute provides that restraints shall be removed when a professional who is currently responsible for the medical care of a pregnant inmate during a medical emergency, labor, delivery, or recovery after delivery determines that the removal of restraints is medically necessary.

Given this history, it is not surprising that statutes and regulations vary significantly and are often unclear in regard to the nature of the restraints prohibited (belly chains, chains over the shoulder, leg irons, and/or handcuffs); whether the prohibition includes transport, labor, and postpartum recovery as well as delivery; to whom the showing of need for restraints is made; and the type of documentation needed to obtain an exception. Therefore, it is not uncommon to find violations being alleged even when such laws or regulations exist. Although relatively few suits have been brought, this is likely to change, given the recent policy shift.[47] General limitations on prisoner suits found in the Prison Litigation Reform Act, such as exhaustion of remedies,[48] apply only during incarceration and not once an inmate is released, which is typically before the statute of limitations has expired for jailed inmates.[49] In addition, some failures to exhaust remedies by incarcerated inmates may be excused. For example, *Goebert* v. *Lee County* reversed a summary judgment and excused the failure by a detainee to pursue an administrative appeal concerning her allegations of inadequate prenatal medical care, where the initial response to her complaint was incorrect, delivered after her infant was stillborn, and the plaintiff was never advised of any grievance system.[50]

Practically, anti-shackling advocates dispute that a woman in labor ever poses a serious enough risk to justify body restraints during childbirth, particularly given that a correctional officer is typically posted nearby. Physicians also question whether a woman is capable of aggression or is a flight risk during labor and the 48 hours after childbirth. To date, there have been no publicized instances of escape attempts by women in labor. The fact that a large percentage of pregnant inmates have committed nonviolent crimes also suggests that generalized policies permitting restraints may be more a reflection of a correctional culture that still tends to focus on male prisoners than a conscious judgment about the need to shackle women who are physically unlikely to pose the risks that would justify such policies. Conversely, the risks posed by restraints to the mother and unborn child during transport, labor, delivery, and recovery have been described as including both emotional distress and physical pain.

ACOG has argued that shackling a woman during labor "may not only compromise her health care but is demeaning and unnecessary," noting that women described "the inability to move to allay the pains of labor, the bruising caused by chain belts across the abdomen, and the deeply felt loss of dignity."[51] The ability to move while in labor has also been identified as a factor in avoiding venocaval occlusion, hypertension, and fetal compromise. Physicians indicate that restraints may also hinder them in reacting to emergencies, which in some cases may delay a necessary cesarean delivery. Similarly, leg shackles may cause women to have severe pain from cramping during labor, to trip or fall while walking, and to soil themselves before the restraints can be removed to allow them to use the bathroom.

In 2010, the AMA adopted a resolution[52] definitively rejecting any type of routine shackling, squarely treating it as a medical issue:

> No restraints of any kind shall be used on an inmate who is in labor, delivering her baby, or recuperating from the delivery, unless there are compelling grounds to believe that the inmate presents:
>
> - An immediate and serious threat of harm to herself, staff, or others; or

- A substantial flight risk, and cannot be reasonably contained by other means.

If an inmate who is in labor or who is delivering her baby is restrained, only the least restrictive restraints necessary to ensure safety and security shall be used.[53]

Similarly, in 2010 the ABA adopted Criminal Justice Standards for Treatment of Prisoners, which includes the following language in Standard 23–6.9 about shackling of pregnant prisoners and new mothers:

(a) Any restraints used on a pregnant prisoner or one who has recently delivered a baby should be medically appropriate; correctional authorities should consult with health care staff to ensure that restraints do not compromise the pregnancy or the prisoner's health.

(b) A prisoner in labor should be taken to an appropriate medical facility without delay. A prisoner should not be restrained while she is in labor, including during transport, except in extraordinary circumstances after an individualized finding that security requires restraint, in which event correctional and health care staff should cooperate to use the least restrictive restraints necessary for security, which should not interfere with the prisoner's labor.

A 2011 ACOG District IX press release in favor of extending California's statute to transport states, "Physical restraints have interfered with the ability of physicians to safely practice medicine by reducing their ability to assess and evaluate the physical condition of the mother and the fetus, thus, overall putting the health and lives of the women and unborn children at risk."[54] In addition, an ACOG District IX fact sheet[55] explains that nearly two-thirds of California jails permit shackling in ways that can cause miscarriage or other injury, and given that many incarcerated women have high-risk pregnancies, shackling during transport can result in trauma that is associated with an increased risk of spontaneous abortion, preterm labor, placental abruption, feto-maternal transfusion, and stillbirth.[56]

Eighth Amendment Analysis Concerning Shackling

The opposition of the medical, legal, and international communities to routine shackling during childbirth establishes that it is better to limit restraints to extreme cases in which a record can be established justifying the practice. This view also reflects the safer course for correctional administrators to avoid litigation, particularly given the recent ACA policy. In light of the current anti-shackling trend, it is expected that lawsuits by women who allege that they or their children were injured from the practice will have a greater likelihood of surviving summary judgment and success at trial.

As mentioned in the legal framework overview, to establish Section 1983 liability, inmates must demonstrate cruel and unusual punishment in violation of the Eighth Amendment, which requires a prison official to be deliberately indifferent by knowing of and disregarding a serious medical need or a substantial risk to an inmate's health or safety.[57] Plaintiffs have also alleged shackling constitutes a violation of international standards in arguing an Eighth Amendment claim.[58]

In evaluating the validity of Eighth Amendment claims, courts rely on the framework established in *Estelle* v. *Gamble* to decide whether the right to adequate medical care was violated:

[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access

> to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under Section 1983.[59]

Estelle indicated it would be a violation if guards were "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."[60] In the medical context, a serious medical need is one that "is sure or very likely to cause serious illness and needless suffering."[61] Moreover, *Farmer* v. *Brennan* explained that "a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."[62] This has been interpreted by lower courts as including a condition "that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."[63] In order to meet the subjective element, the conduct that disregards the medical need must exceed gross negligence.[64] In other words, negligence or medical practice will not state an Eighth Amendment claim.

The Court has not been faced with a case involving shackling of a pregnant inmate. However, *Hope* v. *Pelzer* held that shackling violated the Eighth Amendment in the context of an inmate being handcuffed to a prison hitching post for 7 hours in dire conditions without any clear emergency and in a manner "that created a risk of particular discomfort and humiliation."[65] In 2009, relying in part on *Hope,* a federal circuit court squarely held in *Nelson* v. *Correctional Medical Services* that shackling during childbirth was unconstitutional.[66] *Nelson* also relied on *Women Prisoners of D.C. Department of Corrections* v. *District of Columbia,* which had held that "[w]hile a woman is in labor … shackling is inhumane" and violates her constitutional rights.[67] In the *Women Prisoners'* appeal, the D.C. Circuit confirmed that the trial judge had found that the use of physical restraints on pregnant women violated the Eighth Amendment—a finding that was not challenged by the defendant on appeal. The trial court's order in *Women Prisoners* provided that:

> Defendants shall use no restraints on any woman in labor, during delivery, or in recovery immediately after delivery.
>
> During the last trimester of pregnancy up until labor, the defendants shall use only leg shackles when transporting a pregnant woman prisoner, unless the woman has demonstrated a history of assaultive behavior or has escaped from a correctional facility.[68]

The specific nature of the restraints in an individual case is likely to affect the outcome of the litigation. For example, employing belly and/or leg shackles without a compelling need is problematic. Yet, in a particular case, a court might find that handcuffs do not rise to the level of an Eighth Amendment violation even without an appropriate showing, whereas in another instance, handcuffing could lead to a prisoner falling and causing injury to herself or her unborn child. In dismissing a claim of a woman who alleged she had been shackled while 5 months pregnant during transport and for 3 days in a hospital, the district court indicated in *Hale* v. *Adams County Jail* that "[t]he mere fact that she was shackled during this time period, without more, is not a violation of her constitutional rights."[69] In other words, there must be a causative link between the injury and alleged conduct. Although the plaintiff claimed her child was born with permanent brain damage, the birth took place several weeks later, and it appeared she did not separately claim mental anguish or other consequences of the shackling. However, *Hale* stated a claim of excessive force against the officer who allegedly "slammed" her in the stomach while pregnant, causing her to leak amniotic fluid. Injunctive relief may be available to derail unconstitutional policies even when a damage claim cannot be established. In both contexts, there will undoubtedly be questions about whether transport and postdelivery shackling rise to the level of an Eighth Amendment violation by themselves, as the cases are very fact specific.

Qualified Immunity in Shackling Cases

Establishing an Eighth Amendment violation does not by itself determine liability if the claim is subject to a qualified immunity defense. As previously mentioned, the defense is available to public officials sued in their individual capacity, unless the official has acted with an impermissible motivation or with such disregard of the person's clearly established constitutional rights that the action cannot be reasonably characterized as having been in good faith. Thus, the question of when the constitutional right against shackling in childbirth was established can be key. For example, in *Hope,* the Court denied a claim of qualified immunity in light of precedent in the circuit in which the claim arose, meaning that determining when a right is clearly established may differ by location and depends on the existence of notice. *Nelson,* an Eighth Circuit decision, held that the risks involved in shackling a pregnant inmate in labor and childbirth were obvious and had been "clearly established by decisions of the Court and the lower federal courts before September 2003," thereby rejecting the defendants' qualified immunity claims.[70] Although not bound by *Nelson's* holding, *Brawley* v. *Washington* relied on *Nelson's* reasoning to deny a qualified immunity claim based on restraints applied in 2007.[71] Similarly, in other cases not governed by *Nelson,* the opposition by ACOG, AMA, and other organizations of health care providers to shackling in childbirth by treating restraints as a medical issue cautions that any prospective shackling without adequate cause will more likely be considered an Eighth Amendment violation, which was obvious to officers.

Because jails are typically operated by municipalities, they cannot claim qualified immunity.[72] As a result, for most jails the question will simply be whether the constitutional right was violated because of a policy, practice, or custom in place, not whether it was clearly established at the time of the violation. As a result, jails should be vigilant in reviewing their shackling policies and provide training concerning their application. The success of jail employees in asserting qualified immunity when sued individually for shackling is subject to showing good faith and the right not being clearly established at the time of the violation. The use of restraints may also factor into such state tort claims as wrongful death of an infant or inadequate medical care for a pregnant inmate, as in *Calloway* v. *City of New Orleans,* which affirmed liability against a sheriff but reduced the award of damages.[73]

This discussion suggests that even without specific limitations on shackling in a jurisdiction, prison and jail administrators should question their necessity in individual cases because most pregnant women—particularly those nearing labor—are not flight risks. Advocacy groups often note that they are unaware of any flight attempts by such inmates, despite the likely media attention that this type of story would receive. The shift in public opinion and legal theories supporting liability is evident in the August 2011 award of $200,000 by a federal jury in Tennessee to Juana Villegas for the suffering she endured when sheriff's deputies shackled her to a delivery bed. The plaintiff was detained for not having a driving license but was not initially released because of her status as an illegal immigrant. Although she was later released, she was in jail when she went into labor. The Sheriff's Office later changed its shackling policy in response to the bad publicity generated by the case but claimed the policy was accepted practice in 2008 when the shackling occurred. The federal district court denied the defendant's summary judgment motion and granted the plaintiff's motion for partial summary judgment on her 14th Amendment claim based on the defendants' shackling her during her active final stages of labor and subsequent postpartum recovery in *Villegas.*[74]

At trial, a psychiatrist testified that Villegas suffers from posttraumatic stress disorder, major depressive disorder, and phobia as a result of the shackling and that she will need years of therapy. The defendant has indicated that the judgment will be appealed. Also, as a result of the due process violation, the judge granted the plaintiff's application for a U visa, which would allow her to apply to the U.S. Customs and Immigration Services for visa relief to permit her to remain in the United States to complete presentation of her claims under the Victims of Trafficking and Violence Protection Act of 2000.[75] In addition, the court granted Villegas attorneys' fees of $1.1 million as well as

costs and expenses of approximately $85,000.[76] It should be noted that not all awards are as generous. The plaintiff in *Nelson* ultimately went to trial in 2010 against the only remaining defendant in the case, who was the female officer who shackled her, and was awarded compensatory damages of only $1.00.[77] Even so, for correctional agencies, the common themes in both cases are that the shackling was unnecessary, the legal claims could have been avoided without impairing security or risking physical or psychological suffering of the plaintiffs, and the use of restraints resulted in lengthy and costly litigation.

Section 1983 Claims Against Administrators and Policymakers

As previously mentioned, administrators and policymakers are only held responsible for their own misconduct. Thus, in *Nelson,* although an Eighth Amendment violation was established against the nurse who restrained the inmate, summary judgment was affirmed in favor of the Director of the Department of Correction.[78]

However, failure to adequately train or supervise can be actionable if the policy was adopted with deliberate indifference to the known or obvious possibility of a serious medical risk or in violation of the 14th Amendment right to be free from bodily restraint. For example, in *Zaborowski* v. *Sheriff of Cook County,* the court refused to grant a motion to dismiss brought by the Sheriff of Cook County, IL, in a suit alleging he violated the plaintiff's constitutional rights based on his policy of shackling female pretrial detainees at the Cook County Department of Corrections before, during, and immediately after they give birth.[79] The complaint alleged that the Sheriff:

- Has at all times been personally involved in the formulation and implementation of policies at the Cook County Jail;
- Has permitted the continuation of the official shackling policy that requires correctional officers to shackle pregnant woman in the custody of the Sheriff of Cook County before, during, and immediately after labor and delivery;
- Implements a barbaric practice that needlessly inflicts excruciating pain and humiliation;
- Enforced the shackling policy in willful and wanton disregard of the laws of the State of Illinois; and
- Notwithstanding his actual knowledge of this unlawful and unconstitutional policy … waited more than one year to take remedial action concerning the shackling policy.

The court held "these allegations sufficiently allege" the Sheriff "personally participated in or was involved in the implementation or administration of the shackling policy." The court ultimately granted the Sheriff's summary judgment motion concerning the claim brought against him in his individual capacity but denied summary judgment on the claim that policymakers were aware of a widespread practice of shackling pregnant detainees.[80] In denying summary judgment, the court relied on Fourth Amendment cases rather than applying the deferential review to prison regulations accorded by *Turner* v. *Safley.*[81] Recently, approval was given to settle this class action for $4.1 million, or approximately $35,000 for each class member. The settlement also prohibits shackling in the absence of evidence of a flight or security risk.

Generally, training correctional personnel on revisions to policies and laws on restraints is extremely important, as is providing a procedure which correctional employees must follow in order to obtain permission to employ restraints. A synthesis of the medical and legal literature, as well as the case law, suggests that any default rule should incorporate the positions of AMA and ABA, which would prohibit the use of restraints for pregnant inmates during transport to delivery, during labor and childbirth, and during the immediate recovery from childbirth. In addition,

it should take into account ACA's policy that the decision to permit any allowable restraints should be made by the chief administrator and/or a designee. The most rigorous standard for permitting restraints would require that any exception to this policy should require prior written approval based on a documented showing that the specific inmate presents a compelling security or flight risk and should be given only in exceptional circumstances in light of the general medical evidence to the contrary. ACA uses the word "substantial" in evaluating the flight risk, and "immediate and serious risk of harm" in evaluating the security risk, rather than establishing a general compelling need standard. Although this is more flexible, it is also more likely to generate litigation. To the extent that the use of restraints is approved, as ACA recommends, they should be the least restrictive in light of the documented risk and employed in a way that does not compromise the inmate's pregnancy or health. The types of restraints that are completely banned and the restraints that can be applied when the identified criteria are met should be spelled out to avoid uncertainty or confusion. Policies concerning the use of restraints during the third trimester should also be reviewed in light of medical and humanitarian concerns about such practices.

Chapter 3. Prenatal Health Care in Correctional Settings

What type of prenatal health care is a pregnant inmate entitled to? The legal obligation of providing health care, both in regard to pregnancy and in general, is governed by the Eighth Amendment when Section 1983 claims are brought. If tort claims are brought under state law, they will be subject to any applicable limitations of liability in the state tort claim acts.

Maternal health care issues are only a part of the larger picture concerning appropriate mental and physical medical care in jails and prisons. For example, the Supreme Court affirmed an order requiring the California prison population to be capped at 137.5 percent of design capacity in *Brown* v. *Plata,* finding that crowding was the primary cause of Eighth Amendment violations relating to inadequate medical and mental health care for state prisoners.[82] The National Commission on Correctional Health Care has a longstanding comprehensive position[83] on *Women's Health Care in Correctional Settings*.[84] A review of the entire range of correctional mental health issues can be found in the *Practical Guide to Correctional Mental Health and the Law.*[85] Generally, women often have more medical requests than men,[86] and mental health issues for women can be significant not only in prison but also in jail.[87] On occasion, such issues will be raised in the context of sexual assaults in prison, which implicate the rules[88] promulgated pursuant to the Prison Rape Elimination Act of 2003 (PREA).[89]

Allegations of inadequate prenatal care may be brought in Section 1983 actions based on Eighth Amendment claims, typically relating to miscarriages or stillborn births.[90] When such medical issues arise in a jail or detention context, the analysis proceeds under the due process clause, which provides the same or arguably more protection than the Eighth Amendment analysis.[91] However, it is not uncommon for the parties to ignore this difference, which, if noted by the court, results in a waiver of any argument that a more advantageous standard to plaintiffs is required in assessing the alleged violation.[92] An equal protection claim in a 1983 action also has been asserted on occasion. For example, such a claim survived a motion for dismissal in a suit alleging that the plaintiff's miscarriage resulted from the defendants' discrimination against her on the basis of gender when they refused her medical care during her pregnancy—a condition that is uniquely female.[93]

ABA Standard 23-6.9(a) generally indicates that a pregnant prisoner should receive necessary prenatal and postpartum care and treatment, including an adequate diet, clothing, appropriate accommodations relating to bed assignment and housing area temperature, and childbirth and infant care education. Bangkok Rule 14 provides that in developing responses to HIV/AIDS in penal institutions, programs and services shall be responsive to the specific needs of women, including prevention of mother-to-child transmission. A recent article, "Perinatal Care for Incarcerated Patients," raises several important considerations concerning pregnant inmates.[94] It discusses minimum standards for pregnancy adopted by the Federal Bureau of Prisons, the National Commission on Correctional Health Care, the American Public Health Association, and the American Congress of Obstetricians and Gynecologists. Furthermore, 34 states also have explicit policies governing prenatal care for inmates. Ironically, given the poverty and substance abuse that are common for many of these women, the article reviews studies indicating that incarceration may result in better maternal and fetal outcomes for some inmates. A response to the article[95] pointed out that the

high-risk nature of inmate pregnancies, which may include drug withdrawal, increases the likelihood of miscarriage and stillbirth, making the lack of adequate prenatal care more challenging.[96]

It is the nature of specific care in institutions that determines if a prisoner's legal claim is viable. In this regard, the "Perinatal Care" article poses questions that hospital medical personnel should ask correctional staff when triaging a pregnant woman and deciding when to discharge her. These include the availability of medical staff, alternatives when medical staff are not available, the extent of onsite services, the existence of a medical contact at the facility, how rapidly the woman can be rehospitalized, and whether the prisoner has a prenatal plan if she returns to the community. The more these questions are asked and the staff at the prison recognize the importance of interacting with hospital staff, the less likely women are to be given such grossly negligent health care that it reaches the level of deliberate indifference. Similarly, in her article, "Perinatal Needs of Pregnant, Incarcerated Women," Barbara A. Hotelling advocates that Lamaze educators[97] initiate collaborations with correctional officials to facilitate childbirth of inmates.[98]

A 2010 study[99] by the Rebecca Project for Human Rights reported that 38 states provided inadequate prenatal care.[100] Correctional officials in 15 states voiced issues[101] with some of the information in the report.[102] However, a number of correctional agencies considered the report important enough to respond to, suggesting that maternal health care is a controversial issue that is likely to generate litigation, both by individual claims and in class actions.[103]

Goebert v. *Lee County* exemplifies the difference in Eighth Amendment analysis for officers and policymakers in this context.[104] The Eleventh Circuit concluded that a 1-day delay by a jail commander to provide access to a doctor for a high-risk pregnant detainee who had been leaking amniotic fluid for 9 days could have contributed to her infant being stillborn. The defendant admitted he delayed because he did not believe the plaintiff. Therefore, *Goebert* reversed the trial court's grant of summary judgment, then found the defendant was not entitled to qualified immunity because he had incorrectly told the plaintiff she could not receive additional medical care unless she paid for it. In contrast, the Sheriff, who was sued in his official capacity, had his grant of summary judgment affirmed because he had no actual knowledge that the policy prohibiting detainees to rest during the day was being implemented in a way that ignored medical needs.

Similarly, *Pool* v. *Sebastian County, Arkansas* held that deliberate indifference could be shown where an inmate informed prison officials that she was pregnant, bleeding, and passing blood clots, and her extreme pain from the cramping affected her ability to perform routine daily functions such as eating and showering.[105] In *Doe* v. *Gustavus,* refusal by nurses to provide pain medication, examine the plaintiff, or assist her while she experienced labor pains and, ultimately, delivered her own baby while locked in a segregation cell, was also sufficient to establish deliberate indifference.[106] The opinion explained there was no requirement that the plaintiff present direct evidence of the nurses' state of mind.

The fact that a pregnant inmate miscarries does not by itself establish Eighth Amendment liability. For example, *Jamison* v. *Nielsen* affirmed a grant of summary judgment even though the plaintiff may have been able to show that another course of treatment might have been preferable, or that the defendant was insensitive or negligent because the court found she did not provide facts from which a jury could conclude that the defendant intentionally disregarded an excessive risk to her health.[107] In this context, courts vary as to whether pregnancy or shackling during pregnancy is by itself a serious medical need. However, a number of cases hold that delay of medical care to pregnant inmates can violate an inmate's right to medical care,[108] which also can lead to the denial of qualified immunity.[109] In this regard, *Webb* v. *Jessamine County Fiscal Court* noted that labor, whether premature or at term, "requires immediate attention under contemporary standards of decency."[110] When determining whether an inmate is in labor, factors such as the amount of time left before full term is reached, the symptoms of labor exhibited, any previous or

potential complications, and the reaction of correctional officials are considered.[111] The fact that a healthy baby is born does not defeat the plaintiff's claim, although it may ultimately lessen any damages awarded.[112]

Other pregnancy-related medical claims may also arise. For example, because women have a right not to be sterilized without their consent,[113] sterilization of an inmate during childbirth may raise an Eighth Amendment claim. Death of a pregnant inmate unrelated to labor can also result in litigation. Thus, *Shultz* v. *Allegheny County* denied a motion to dismiss based on a pregnant inmate's death due to bacterial pneumonia where it was alleged that the county, prison health services, and various officials and employees ignored her serious medical problems.[114] Villegas also survived summary judgment based on her Eighth Amendment allegations of failure to provide a breast pump that was needed to prevent engorgement. ABA Standard 23-6.9(e) provides that governmental and correctional authorities should strive to meet the legitimate needs of prisoner mothers and their infants, including a prisoner's desire to breastfeed her child. Similarly, Bangkok Rule 48.2 states that "women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so." In contrast, several cases have allowed restrictions on breast feeding as inconsistent with the reality of prison life.[115] In addition, in *Lawson* v. *Superior Court,* allegations that a prisoner was denied a breast pump while she was incarcerated with her infant daughter did not trigger state tort claims act liability for failure to take action when a prisoner is in need of immediate medical care because the court found that the deprivation did not amount to neglect of a serious and obvious medical condition.[116] Given this split, continued litigation about breast pumps is likely.[117] Due to relatively high recidivism rates of women entering jail, it has been suggested that providing contraceptive services at the time of release may help decrease the number of women who enter jail pregnant and consequently decrease medical issues that occur in that setting.[118]

Immunity from state claims may be a consideration under tort claims acts. Any immunities under state law are determined by the specific language of the state's tort claims act. For example, in *Lawson,* a prisoner who resided in the private correctional facility with her infant daughter sued the state, the operator of the correctional facility, and their employees for failure to furnish medical care to the prisoner, negligence, infliction of emotional distress, false imprisonment of her daughter, and violation of Section 1983. The court found that tort claims act immunity for injuries to prisoners did not apply to injuries to the prisoner's daughter and that a claim of negligence against the state was properly alleged. In contrast, the private operator of the facility and its employees could not assert any governmental immunity for either the inmate or her child. A number of additional articles discuss legal issues regarding pregnancy and prenatal care of inmates.[119]

Chapter 4. Pregnant Inmates' Abortion Rights

Does a pregnant inmate have a right to obtain an elective nontherapeutic abortion, and, if so, must the governmental entity pay for it? Pregnant inmates have the right to obtain an abortion, and even when not judicially mandated, it is better policy for correctional officials not to require any type of court order before allowing a woman to terminate her pregnancy voluntarily or to enact policies that have the practical effect of preventing women from voluntarily terminating their pregnancies. It is unclear whether prison-based preconditions such as obtaining counseling prior to an abortion will be upheld. To the extent such regulations exist, they should enable inmates to receive expedited consideration so that any failure to comply that is not attributable to the inmate does not negate the ability to obtain an abortion before viability. Statutory and judicial decisions in each jurisdiction determine whether a pregnant inmate must pay for the abortion and for transportation and/or security.

The Constitutional Right To Obtain an Abortion

It is well-settled that a woman has the right to obtain an abortion before viability of the fetus without undue interference from the state.[120] A state regulation constitutes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[121] However, policies that practically restrict a pregnant detainee or prisoner from accessing abortion services have produced mixed legal results. The Court has not directly addressed the standard to be applied in this context. In *Arpaio* v. *Doe,* the Court denied a "writ of certiorari[122] to an Arizona case.[123] The Arizona opinion in *Arpaio* held that an unwritten policy requiring jail inmates to obtain a court order to be transported to obtain an abortion was unconstitutional. Although the denial of certiorari effectively vindicated the inmate's right to obtain an abortion in the specific case, it has no precedential value. As a result, state and federal courts hearing such cases are still grappling with the appropriate standard to be applied in determining the legality of any policy impeding access to abortion and have reached inconsistent conclusions when applying the same standard in seemingly similar factual circumstances. Moreover, a recent survey found widespread differences in how correctional health professionals facilitate incarcerated inmates' access to abortions.[124] Given these inconsistencies, it is likely that more litigation will result. For a recent review of the legal literature, see *Access To Elective Abortions For Female Prisoners Under The Eighth And Fourteenth Amendments.*[125]

In addition to *Arpaio,* several courts have issued injunctions against regulations requiring court-ordered releases for inmates to obtain nontherapeutic elective abortions. For example, *Monmouth County Correctional Institutional Inmates* v. *Lanzaro* held that a county order requiring inmates to secure court-ordered releases to obtain an abortion while in the county's custody was unconstitutional.[126] *Doe* v. *Barron* granted a temporary restraining order to a female prisoner requesting access to pregnancy termination services after the director of the correctional center refused to provide access without a court order.[127] Most recently, *Roe* v. *Crawford* held that a Missouri Department of Corrections (MDC) blanket policy prohibiting transportation of pregnant inmates offsite for elective, nontherapeutic abortions was unconstitutional.[128]

In contrast to the cases rejecting barriers to inmates' access to abortion, *Victoria W.* v. *Larpenter* affirmed summary judgment and approved Louisiana's prison policy of requiring judicial approval of all elective medical procedures, including abortions.[129] *Victoria W.* concluded, "[T]he policy of requiring judicial approval of elective medical procedures is here reasonably related to legitimate penological interests. The policy was not promulgated with deliberate indifference to its consequences and was not the direct cause of the inmate's injury."[130]

Even when relief is granted, it can take so long that the woman may by then have exceeded the timeframe to obtain a legal abortion or, in some second trimester cases, may decide to give birth and place the infant for adoption. The procedural history in *Crawford* indicates how difficult it can be for a pregnant inmate to obtain timely relief. Roe asked for an abortion in California on learning she was pregnant but could not get one before she was transferred to Missouri, where her request for an abortion was denied. She was 16–17 weeks pregnant by the time she obtained legal representation and requested the trial court to grant an emergency injunction to permit her to obtain an abortion. The abortion would only have been legal until week 22. Justice Thomas granted a stay of the injunction, which was vacated by the Court, allowing Roe to obtain an abortion. Roe then amended her complaint and filed a class action challenging MDC's policy.

Courts Apply *Turner* Rather Than *Casey* in Evaluating Constitutionality

Legal advocates for pregnant inmates argue that the standard established by *Turner* v. *Safley*—which is deferential to decisions by the prison administrator—should not apply in cases challenging abortion restrictions.[131] Instead, they claim the correct standard is *Casey's* undue burden test, which is more likely to favor the right to obtain an abortion in an incarceration setting. The rationale for applying *Casey* is that the Supreme Court refused to apply *Turner* in *Johnson* v. *California,* a case involving the right to be free from racial discrimination in prison.[132] In *Johnson,* the Court found freedom from racial discrimination is not inconsistent with incarceration, bears no relationship to the goals of criminal deterrence or social isolation, and implicates no security concerns. By analogy, plaintiffs have argued that a woman's right to choose to terminate her pregnancy also implicates no legitimate penological interests and therefore should be evaluated by the standard used outside the prison setting. In other words, they contend that *Casey* provides more protection for abortion rights than *Turner.*

Ironically, in *Arpaio,* the correctional defendants argued that the standards in *Casey* and *Turner* should be applied sequentially, apparently believing that *Casey* would approve prison-based procedural restrictions because similar procedures such as waiting periods, mandatory counseling, and parental notifications subject to judicial bypass have been upheld under the undue burden standard. The appellate decision in *Arpaio* rejected this two-prong approach, indicating that only one standard should be applied, and then rejected *Johnson* as the appropriate standard.

As a result, *Arpaio* applied *Turner,* which established four criteria for determining the constitutionality of prison regulations:

1. Is there a valid rational connection between the prison regulation and the legitimate governmental interest?
2. Are alternative means of exercising the right available to inmates?
3. What impact will accommodation of the constitutional right have on guards, other inmates, and allocation of prison resources?

4. Are there ready alternatives that permit accommodation of the right at "de minimis" cost to valid penological interests?

Even using *Turner, Arpaio* found that a constitutional violation had occurred based on a number of factors:

- The facility indicated no security concern.
- Any cost was de minimis, not only due to the low number of requests but also because the regulation required inmates to reimburse any security and transportation costs, and the facility would have to provide proper prenatal, delivery, and postnatal medical care if no abortion took place.
- Claims that third-party liability might arise were vague and unconvincing in light of Arizona law.
- "An indiscriminate ban on all transportation for non-therapeutic abortions does not allow inmates sufficient alternative means to exercise their right to choose to have an abortion."[133]
- The county has an inexpensive alternative to court orders by administratively deciding on requests.

The court concluded that the county's policy was an "exaggerated response," which was unconstitutional. *Monmouth* and *Crawford* also applied *Turner* in evaluating restrictions on inmates who wanted to terminate their pregnancies and reached the same result.

Unlike these cases, when *Victoria W.* applied *Turner* to policies requiring a judicial order, it upheld the challenged court order policy. *Victoria W.* emphasized that the inmate had the burden to disprove the validity of the regulation, thereby finding the financial and administrative concerns legitimate, crediting the policy aim of reducing the total number of offsite transports as reducing "the effects on prison resources, inmate security, and potential liability."[134] *Victoria W.* viewed a court order as a valid alternative means of exercising the abortion right, whereas *Monmouth* had considered this insufficient, given time constraints on women to obtain legal abortions. However, both *Victoria W.* and *Crawford* explicitly noted that the type of court order rejected in *Monmouth* required inmates to be released on their own recognizance and therefore was more onerous than a court order authorizing an elective abortion, as approved in *Victoria W. Victoria W.* also disregarded the offer to pay for the procedure and security as ignoring the fact that the prison might be short-handed or subject to potential liability for the transport.

Under *Casey's* undue burden analysis, it is doubtful that the lengthy delay of the pregnant inmate to see a judge in *Victoria W.* would have been upheld, although in the *Turner* context, *Crawford* gratuitously suggested that a judicial order would have been an acceptable alternative to the blanket prohibition it rejected. Several of the abortion cases involve 7-week delays, which can effectively result in a woman being beyond the legal time limit to obtain an abortion, especially if she did not immediately realize she was pregnant, because not all facilities immediately check a woman for pregnancy when she enters. Therefore, lawyers representing pregnant inmates are likely to argue that obtaining any court order is an undue burden when time is of the essence in scheduling an abortion and a delay may result in the unwanted birth of a child. That delay caused by incarceration can effectively preclude an abortion is also demonstrated by *State* v. *Kawaguchi*.[135] The judge in *Kawaguchi* sentenced a pregnant defendant to a prison term, rather than the community-based sanction for which she was eligible, when the judge discovered that the defendant intended to obtain an abortion. The inmate ultimately gave birth, and the appellate court reversed her sentence on state law grounds without reaching the question of whether the sentence violated her constitutional rights. In a related action, the Ohio Supreme Court suspended the judge in *Kawaguchi* for 6 months for imposing the inappropriate sentence and countermanding another judge's order to grant the defendant an appellate bond, finding that clear and convincing evidence indicated that she would have granted probation if the defendant had agreed to not obtain an abortion.[136]

Generally, policies that incorporate routine initial monitoring for pregnancy can help ensure that pregnant inmates receive the appropriate prenatal care, particularly when they exhibit a substance abuse problem. In this regard, Standard 23–2.1, Intake Screening, of the ABA Criminal Justice Standards for Treatment of Prisoners calls for medical and mental health screening as soon as possible upon the prisoner's admission to a correctional facility, using a properly validated screening protocol, including, if appropriate, special protocols for female prisoners.[137] Regulations mandating that women be tested for pregnancy upon entering any correctional facility would assist women in deciding whether or not to terminate their pregnancy in a timely manner. In future cases, determining which standard to apply is likely to remain a central issue.[138]

Abortion as a Serious Medical Need in Eighth Amendment Analysis

In addition to disagreement over the standards for evaluating the abortion rights of pregnant inmates, there are also conflicting opinions about whether abortion is a serious medical need for purposes of Eighth Amendment analysis—an issue that is key when claims are brought under Section 1983 alleging damages that result from an inmate's denial of her right to obtain an abortion or to obtain funding for the abortion or transport. Although *Monmouth* viewed abortion as a serious medical need, later cases have met with mixed results. For example, *Crawford* specifically held that "an elective, nontherapeutic abortion does not constitute a serious medical need, and a prison institution's refusal to provide an inmate with access to an elective, nontherapeutic abortion does not rise to the level of deliberate indifference to constitute an Eighth Amendment violation."[139] Several commentators have critiqued this result, particularly noting that giving birth would require many inmates to undergo high-risk pregnancies, in light of their likely histories of substance abuse, poor health, and poverty. Furthermore, in many cases, the child would be placed in foster care or given up for adoption, which could also affect the often fragile mental health of these women.[140]

As with miscarriages and stillbirths, not every barrier to terminating a pregnancy establishes Eighth Amendment liability, even if abortion is considered a serious medical need. *Bryant* v. *Maffucci* affirmed a grant of summary judgment in a Section 1983 action where the pretrial detainee failed to establish that the delay in scheduling the abortion was the result of anything more than mere negligence on the part of correctional authorities.[141] In other words, negligence did not establish a deprivation of due process. The plaintiff's Eighth Amendment claim failed because the facility's procedure for termination required only a written request, not permission from either the Department of Corrections or the court. In a related vein, *Gibson* v. *Matthews* held that officials were entitled to qualified immunity and that their actions did not rise to a level of a constitutional violation concerning negligent failure to provide an abortion.[142] Again, the grant of qualified immunity rested on the lack of a clearly established constitutional right at the time of the abortion request, although the court did find that abortion was a serious medical need. More recently, *R.W.* v. *Armor Correctional Health Services, Inc.* found that no Eighth Amendment claim was stated for delayed medical care in failing to give an inmate who was a rape victim a prescribed anticonception pill because there was no indication that she sustained serious physical injury as a result of the alleged delayed treatment. In that case, she was given the pill the next day and did not become pregnant.[143]

Restrictions on Funding the Cost of Abortions, Transportation, and Security

The question of funding for inmate abortions is also in dispute. *Monmouth County* held that, to the extent that a county's regulation requiring inmates to finance their own abortion impinged upon the inmate's right to have an abortion, the regulation was unconstitutional. In the absence of alternative funding sources, the decision found that the county must assume the cost of providing inmates with elective, nontherapeutic abortions. *Monmouth* was decided after the Supreme Court held that a state could withhold funding for elective abortions (which might make it

impossible for some women to obtain an abortion) but before *Webster* v. *Reproductive Health Services* (which held that a statutory ban on the use of public employees and facilities for performance or assistance of nontherapeutic abortions did not contravene the Constitution) and before *Rust* v. *Sullivan* (which upheld a federal regulation prohibiting federally funded medical clinics from counseling or referring women for abortion).[144] Although *Crawford* found that the inmates' rights to access abortion services had been violated, it specifically disagreed with *Monmouth* that there was any requirement to fund or help facilitate abortions, finding the *Webster* line of cases more in keeping with current Supreme Court jurisprudence.

A number of states have laws prohibiting the expenditure of public funds for elective abortions. However, even greater than the difficulty of finding a low- or no-cost abortion provider or a private group willing to fund the abortion is finding a provider that is local when the correctional facility is located in a rural area or a jurisdiction in which public opinion heavily favors the pro-life point of view. In such settings, transport, overnight stays, and security costs become primary financial concerns. Although holding a blanket policy against transporting women to obtain elective abortions was unconstitutional, *Arpaio* did not question the legitimacy of an Arizona statute that required the pregnant inmate to pay for the cost of security and transportation, as well as the abortion, and even relied on those facts to support its holding.

In some jurisdictions, it is unclear whether security and transport expenses are included in the ban on abortion funding. For example, Bureau of Prison (BOP) funds[145] are used to pay for abortion services "only when the life of the mother would be endangered if the fetus is carried to term or in the case of rape." In all other cases, non-BOP funds must be obtained to pay for any abortion procedure, although BOP may pay to escort the woman to the facility where the abortion occurs.[146] One article recently questioned whether BOP abortion regulations satisfy procedural due process as applied in individual cases, suggesting the need for timely notice of the right to choose abortion, defined procedures for doing so, expedited screening by religious counselors, and administrative hearings to review cases.[147]

In light of the conflicting decisions, it would be prudent for correctional administrators to review their own regulations carefully to determine whether they hinder an inmate's right to choose to terminate her pregnancy. Cases in which women have ultimately given birth because of abortion restrictions are likely to result in litigation, regardless of whether or not such cases are ultimately successful. Similarly, constitutional claims based on privacy and denial of equal protection may be brought if a medical employee refuses to give a prescribed anticonception pill.[148] Although blanket orders essentially prohibiting abortion can be expected to result in denials of qualified immunity, regulations requiring court orders may also produce the same outcome in some jurisdictions.

Chapter 5. Female Inmates' Proximity to Family

Women's prisons are often located far from home, depriving female inmates of the opportunity to visit with their families as often as male inmates. Is this a basis for a constitutional challenge? Although it is currently unlikely that a successful constitutional challenge can be raised on these grounds, from a policy perspective, it is questionable whether such family separation is beneficial to incarcerated mothers or their children. Sensitivity about how family issues affect an incarcerated mother's programming in prison and her chances of rehabilitation upon reentry into the community can benefit the operational management of the institution as well as the inmates.

Because there are fewer incarcerated women than men, and because of the hesitancy to place women in men's correctional facilities, fewer institutional choices are typically available to women. Therefore, it is not uncommon for women to be located farther from home than men.[149] Although this circumstance might seem ripe for an equal protection challenge, such claims often fall prey to penological realities. For example, in *Pitts* v. *Thornburgh,* the court applied heightened scrutiny in a case challenging general budgetary and policy choices made over decades that resulted in women prisoners being sent out of the District of Columbia, and still ruled against the plaintiffs.[150]

Pitts reasoned that, unlike *Turner,* the basic policy decision of whether to provide a local women's prison facility "does not directly implicate either prison security or control of inmate behavior, nor does it go to the prison environment and regime." Therefore, it applied the heightened equal protection review, which asks if the challenged classification serves important governmental objectives and whether the discriminatory means employed are substantially related to achievement of those objectives.[151] Even so, the court upheld closing the local women's institution to provide more housing for men because it satisfied a substantial governmental interest of alleviating overcrowding in men's institutions. As a result, the women were required to serve their sentences in West Virginia, far from home and family. A later attempt to reopen this case was denied in *Pitts* v. *Thornburgh*.[152]

The Court's view of the due process clause in a prison setting also has not proven to be helpful to prisoners because "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[153] *Meachum* v. *Fano* held that due process did not create a liberty interest in prisoners to be free from intrastate prison transfers, even from a medium- to maximum-security facility, because this was within the normal limits or range of custody that the conviction has authorized the state to impose.[154] Therefore, a prisoner has no inherent constitutional right to be confined in a particular prison or to be held in a specific security classification. For example, in *Olim* v. *Wakinekona,* the Court found no constitutional right that would block an interstate transfer from Hawaii to California.[155] Yet, one could imagine that staying connected to family or meeting reunification plans imposed by dependency courts involving children would be challenging in the absence of correctional initiatives providing access to technology, such as teleconferencing or Skype, as alternatives to visits, or reducing rates for telephoning children. Similarly, denial of placement upon parole in a community corrections program due to an insufficient number of beds or to home detention was not subject to due process protection in *Johnson* v. *United States*.[156]

In *Froehlich* v. *State of Wisconsin Department of Corrections,* the children of an incarcerated mother sued to prohibit her transfer to an out-of-state prison.[157] Judge Posner rejected the Eighth Amendment challenge based on cruel and unusual punishment as frivolous because the state is not punishing the children. In other words, the incidental infliction of hardship on a person not convicted of a crime is not punishment within the meaning of the Eighth Amendment. However, the judge considered the transfer to be insensitive and, while recognizing that such an accommodation is not constitutionally imposed on prison officials, noted that "it may be a moral duty." The practical problem is that overcrowding and budget constraints can result in women being sent to facilities out of the jurisdiction or far from home because there is no constitutional right of either the mother or child to limit such transfers.[158]

Relatively few correctional departments or organizations, such as Forever Family in Atlanta, GA, and Get on the Bus in CA, provide transportation for families to visit prisoners in institutions that are far from home.[159] Administrators have the discretion to ensure that such visits are as convenient and child-friendly as possible. In this regard, Bangkok Rule 26 indicates that contact with families, including children, "shall be encouraged and facilitated by all reasonable means" and, where possible, "measures shall be taken to counterbalance disadvantages faced by women detained in institutions located far from their homes." Such measures might include evaluating the feasibility of creating partnerships to provide transportation and enhanced parenting programs, with particular attention given to the difficulties encountered by inmates with children in foster care who must meet court-ordered criteria to obtain reunification. Similarly, finding ways to reduce telephone expenses can remove a common yet significant barrier to maintaining contact with children.[160] A recent review of good practice in women's prisons, sponsored by the Australian government, mentioned "designing all new women's corrections centres to incorporate the needs of children, including incorporation of community spaces, play areas, [and] additional emphasis placed on visiting areas."[161] In addition, the report identified good practice as including "locating prison facilities near an urban centre that is most equitable for prisoner families, taking into account the other factors, such as access to education, family and support networks and transport,"[162] and providing access to Skype or teleconferencing.[163]

Other child-friendly programs, such as Girl Scouts Behind Bars, prison nurseries and overnight or other intensive visitation programs, also help facilitate family relationships and motivate female inmates. In 2012, Dr. Denise Johnston, who was the Executive Director of the Center for Children of Incarcerated Parents in Pasadena, CA, wrote an article, entitled "Services for Children of Incarcerated Parents," that highlighted a number of innovative jail and prison programs that further family reunification and identified the elements that are common to successful programs.[164] Although not all incarcerated mothers whose children are in foster care will reunite with their children, visitation remains important, particularly in instances where other family members or friends retain custody of the children. Moreover, for the majority of children of incarcerated mothers who are not in foster care, visitation is also key to facilitating successful reunification. Without maintaining connections during imprisonment, it is difficult to assume that families will easily reunite once parents are released from prison, regardless of whether or not legal impediments exist.[165]

Because maintaining family contacts is also an indicator of a more successful reentry, it has implications for the prison system in lowering the rate of recidivism.[166] Therefore, services that focus on transitional reentry while women are incarcerated and that prepare them to succeed should be viewed as essential, even though the absence of such services may not violate any constitutional rights. Many correctional agencies now recognize the importance of forging connections with government agencies to enable women to obtain the necessary documentation for housing, health care, child-related services, and other services before leaving an institution, finding this may be as critical to the rehabilitation of female offenders as effective programming. In several urban areas, coordinating councils comprising all of the agencies involved in the criminal justice system have been established to explore how to create better options for and fairer treatment of women offenders, who are still a small, though growing, segment of the incarcerated population. Recognizing the needs of many female inmates upon release, a few jurisdictions have

instituted reentry courts to focus on providing services; the courts may involve both probation and parole departments as well as community correctional placements.[167]

From a public policy perspective, a significant underlying question raised by the imprisonment of women far from home is whether many of them who are nonviolent and serving lengthy terms under harsh drug laws can be rehabilitated in community correctional facilities located closer to their homes. In that event, they would be able to maintain family ties and also be more likely to obtain training and jobs that would assist in their successful reentry following release. If prison administrators consider such inmates to be good candidates for community-based programs without jeopardizing public safety, the chances of instituting such options are greater, although not every such effort will necessarily be successful.

California is a prime example of a state trying to cope with a large population of female offenders, many of whom pose a minimal risk to public safety. Several years ago, California recognized that nearly half of its female incarcerated population could be housed in the community; however, an attempt to house approximately 4,500 low-risk nonviolent women in community correctional facilities did not succeed, in part because of the lack of available facilities able to handle such a dramatically increased population. Relatively few women ultimately benefited from that initiative. In contrast, major legislative efforts recently radically reduced the state female prison population in California against the backdrop of such dire prison overcrowding—mainly involving males—that the state was required to release more than 30,000 prisoners in 2 years.[168]

First, the "realignment" pursuant to Assembly Bill 109, which became effective on October 1, 2011, mandated that individuals sentenced for nonserious, nonviolent, or non-sex offenses will serve their sentences in county jails instead of state prison and be supervised by probation officers after release.[169] Although each county determines whether to establish programs releasing low-risk prisoners, realignment affects all prisoners; by January 2013, the number of female offenders no longer in state custody exceeded 3,500. However, for many of these prisoners, this shift is simply a change of venue to county jails, which may be closer for visiting but may have fewer services and more crowding. Moreover, even though the state population of female prisoners is now fewer than 6,000, the transformation of one of the female prisons into a male facility has resulted in dramatic overcrowding of the Central California Women's Facility, which was for a time the most crowded prison in the state. In contrast, the California Institution for Women, a smaller women's prison in southern California, has enhanced visiting for mothers and their children. The state has also just opened a 400-bed facility for low-risk females that will offer rehabilitative and educational programming and has announced that one of its programs will focus on family reunification.

Second, in 2010, Senate Bill 1266 was enacted specifically to permit nonviolent female inmates, pregnant inmates, and male primary caregivers to be released to home or authorized residential drug treatment or transitional care facilities, so long as they are monitored by a global positioning system and have less than 2 years left to serve on their sentence. Titled the Alternative Custody Program (ACP), the legislation amends Penal Code sections 1170.05 and 4532. The legislative findings justifying the statute could, in fact, describe the female prison population of most urban states, and conclude that, "[t]o break the cycle of incarceration, California must adopt policies that facilitate parenting and family reunification." Approximately 4,000 women—nearly half of the California female prison population when enacted—may be eligible for release under this plan.[170] However, to date, relatively few prisoners have been released under this program, which has been criticized for not also releasing fathers who meet the eligibility requirements.[171]

Practically, ACP is an alternative to general sentencing reform, which has generated intractable political resistance. Instead, this correctional initiative does not require women to be resentenced. The California Department of Corrections and Rehabilitation (CDCR) prescribes the regulations for the program and selects participants, who are given credit as if they served their sentence in state prison. One short-term consequence of realignment is that CDCR

appears to be discontinuing all but one of its mother-infant programs, likely assuming that, under ACP, women currently enrolled in the programs will be eligible for release or sent to county jails to serve the remainder of their sentences. Yet, even to the extent that mothers are released pursuant to ACP, the legislation's ultimate success is uncertain because ACP is an unfunded mandate, which realistically means that women must find their own community resources upon release.

Other states have also enacted parent sentencing alternatives that place parents in the community with their children, under intensive supervision. For example, more than 200 offenders—mainly mothers—have successfully completed a program in Washington that has diverted 44 children from foster care and provided cost savings since it began in June 2010. The program has two components—one that provides judges with a community sentencing alternative, and one that allows eligible, incarcerated offenders to serve the last 12 months of their sentence in the community, on electronic monitoring with more intensive supervision.

Chapter 6. Visitation Rights for Inmate Mothers

Are jails and prisons required to provide visitation? If they do not, are they inflicting hardship not only on the mother but on the children as well? Although visiting is a privilege and not a right, restrictions must be reasonably related to penological goals. From a policy perspective, contact and extended visits with children strengthen the mother-child bond, improve the mother's attitude in prison, and increase the likelihood of her successful reintegration into the community.

Visiting: The Constitutional Context

Even though visiting is essential to maintaining relationships with family members, including children, and may be a practical necessity for mothers who are subject to reunification plans, the Supreme Court has consistently upheld restrictions on contact visits for inmates, regardless of whether they have been convicted of a crime. *Block* v. *Rutherford* affirmed a blanket prohibition on contact visits for pretrial detainees as an entirely reasonable, nonpunitive response to the legitimate security concerns identified and, therefore, as consistent with the 14th Amendment.[172] The decision specifically noted:

> We do not in any sense denigrate the importance of visits from family or friends to the detainee. Nor do we intend to suggest that contact visits might not be a factor contributing to the ultimate reintegration of the detainee into society. We hold only that the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility.[173]

Similarly, *Kentucky Department of Corrections* v. *Thompson* held that the denial of prison access to a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence."[174] *Thompson* has been interpreted as rejecting a fundamental right to a particular kind of visit. However, in his concurring decision in *Thompson,* Justice Kennedy recognized that "[n]othing in the Court's opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the due process clause in a way that the precise and individualized restrictions at issue here do not."[175]

The most recent Supreme Court precedent is found in *Overton* v. *Bazzetta,* which rejected a constitutional right to visit for individuals who are not immediate family members, upholding restrictions on noncontact visits to prisoners that exclude visits by minor nieces and nephews and children as to whom parental rights have been terminated.[176] The regulations do allow noncontact visits between inmates and their own children, grandchildren, and siblings; these provisions, as well as rules addressing the criteria for contact visits, were not discussed. *Bazzetta* did "not imply that any right to intimate association is altogether terminated by incarceration or is always irrelevant" to prisoner claims but sustained the challenged restrictions because they bore a rational relationship to legitimate penological interests and therefore were valid under the *Turner* test. The correctional officials had argued that the regulations

promoted internal security by reducing the total number of visitors and limiting the disruption caused by children, and protected children from exposure to sexual or other misconduct or from accidental injury.

Bazzetta concluded that "freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context."[177] Therefore, the fact that the policy relegated some inmates to brief and expensive phone calls, or that letters were an inadequate alternative for illiterate inmates and to communicate with young children, was not determinative because "*Turner* does not impose a least-restrictive alternative test." Thus, the effect of limited visitation on children and extended families w*as not factored into the legal analysis*. Pre-Bazzetta, *Valentine* v. *Englehardt* rejected a total ban on visits with the children of prisoners that relied in part on "the judgment of the jailer that it is not in the best interests of the children to visit their parents while those parents are in jail."[178] *Valentine* concluded:

> The jail officials here have taken it upon themselves to deny all these individuals who are incarcerated for whatever reason and their children one of the most fundamental of all human rights. The rule forbidding incarcerated parents from seeing their children is not only arbitrary, it is an exaggerated response to a concern which does not properly rest with the jail authorities.[179]

This result appears to remain valid after *Bazzetta* because banning all children, even from noncontact visits, is the type of "exaggerated response" that courts find problematic. In other words, because *Bazzetta* did not involve minor children of prisoners, inmates can still be expected to argue that a right to visit with one's own children should be treated differently by the court when evaluating restrictions under the *Turner* standard, and whether *Turner* should be applied at all. The ABA Standards provide that policies and programs should be implemented to facilitate healthy interactions between prisoners and their families, including minor children, and encourage contact visits, especially with minor children, absent an individualized determination that a contact visit between a particular prisoner and a particular visitor may jeopardize a criminal investigation or trial, institutional security, or the safety of any person.[180]

In addition to the stress placed on mothers by the absence of visits, it is well recognized that children, particularly those raised by single mothers, face hardships that are exacerbated by the inability to interact on a personal level.[181] For single mothers living in poverty, lack of a support network may hinder the ability to achieve viable alternative placements, especially when siblings are involved, which can result in children being placed in unstable arrangements. This may help to explain why children of female offenders are five times more likely to be in foster care than children of male inmates, along with the fact that, unlike most children of male offenders, who reside with their mothers in the community, most children of female offenders do not reside with their fathers.[182] Marilyn C. Moses has observed that "a child's stability appears to be most threatened by a mother's incarceration" and "that children of incarcerated mothers were four times more likely to be 'still in' foster care than all other children," ultimately aging out at 18.[183] One study found that mothers who had been incarcerated were 2.5 times more likely than fathers to report that their own adult children were incarcerated and that the risk of poor outcomes generally intensified with maternal incarceration.[184]

Even though *Bazzetta* affirmed a 2-year ban on noncontact visits for inmates with two substance abuse violations, it recognized that a permanent, extended, or arbitrary withdrawal of all visitation could produce a different result.[185] Similarly, *Harris* v. *Donahue* reversed the dismissal of a convicted child molester's complaint that challenged a policy prohibiting his minor children from visiting him because it raised a due process question.[186] The court noted that because the liberty interest of a parent to have a reasonable opportunity to develop a close relationship with their children is important, and because visitation may significantly benefit both the prisoner and the prisoner's family, it

would not presume that a security justification or other penological interest supported the restrictive visitation policy. Thus, there may be due process implications in banning visits with one's own immediate family members that are not implicated when the degree of consanguinity is more attenuated.

In contrast, *Maze* v. *Tafolla* upheld jail regulations prohibiting pretrial detainees accused of murder from having contact visits with their minor children, finding no precedent to apply *Turner* differently in cases where the inmate was not convicted.[187] Similarly, *Wirsching* v. *Colorado* held that prison officials did not violate a convicted sex offender's rights of familial association and due process by refusing to allow his child to visit when he refused to comply with the requirements of his treatment program.[188] However, *Wirsching* prefaced its analysis of the *Turner* factors with the following language, which might favor visiting in contexts more likely to resemble those facing nonviolent mothers, particularly those whose parental rights may be terminated due to their inability to maintain a relationship:

> We acknowledge at the outset that the interests Mr. Wirsching asserts are important ones. The Supreme Court has held that "parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children." *Hodgson* v. *Minnesota,* 497 U.S. 417 (1990) (Scalia, J., concurring in part and dissenting in part, and citing *Santosky* v. *Kramer,* 455 U.S. 745, 753-754 (1982); *Caban* v. *Mohammed,* 441 U.S. 380 (1979); and *Stanley* v. *Illinois,* 405 U.S. 645, 651-652 (1972)). In the prison context, courts and commentators have observed that visitation may significantly benefit both the prisoner and his family. *See Ky. Dep't of Corr.* v. *Thompson,* 490 U.S. 454, 465-70 (1989) (Marshall, J., dissenting); *see* also *Thornburgh* v. *Abbott,* 490 U.S. 401, 407 (1989) (stating that "[a]ccess [to prisons] is essential … to families and friends of prisoners who seek to sustain relationships with them").[189]

Because visitation is a privilege, a number of visiting cases arise in the context of misconduct that results in a restriction. In *Bazzetta* v. *McGinnis,* the Sixth Circuit concluded that the Supreme Court had implicitly rejected the plaintiff's procedural due process claim in *Overton* v. *Bazzetta* and ruled that there was no liberty interest in a permanent but reviewable visitor restriction policy for substance abuse violators.[190] Similarly, in *Poole* v. *Michigan Reformatory,* where a prisoner's fiancée smuggled contraband, permanent restriction of the fiancée's visits was appropriate, but the court left open the Eighth Amendment and freedom of association claims regarding a permanent and unreviewable ban on all visitation.[191] *King* v. *Caruso,* a suit filed by a prisoner's wife who was banned from visiting for conspiring to smuggle a cell phone into the prison, was rejected because she was afforded a hearing prior to being banned.[192] Moreover, *King* held that a prison visitor was not a member of a protected class for purposes of equal protection, a category that is likely to include all family members.[193]

In *Hernandez* v. *McGinnis,* a 3-year suspension of visitation did not violate the inmate's right to free association and due process where it was based on the prisoner's attempt to bring a weapon into the visiting room.[194] Finally, *Phillips* v. *Norris* held that a denial of contact visitation for 37 days during segregation did not amount to atypical and significant hardship for due process purposes or constitute cruel and unusual punishment.[195] Thus, challenges to restrictions related to prisoner and visitor misconduct are typically unlikely to succeed unless they are egregious or permanent, with no opportunity for review regardless of whether it is based on First, Eighth, or 14th Amendment grounds. Moreover, qualified immunity is likely to apply because of the unsettled nature of such rights, resulting in rights not being clearly established. For example, the Ninth Circuit's opinion in *Dunn* v. *Castro*[196] reversed the denial of the defendant's Rule 12(b)(6) motion to dismiss and held that prison officials were entitled to qualified immunity for restricting visits by a male inmate's minor children for 18 months due to a sexually oriented telephone conversation between the inmate and his wife, which was overheard by the couple's child. Although both *Bazzetta* and *Dunn* are routinely cited for the proposition that prisoners do not have an absolute right to receive visits from their children

while they are incarcerated, as previously mentioned, visiting cases are fact specific and caution against any blanket policies prohibiting visits by minor children in the absence of any misconduct or sex offenses in the prisoner's history.[197] Similarly, Bangkok Rule 23 bars disciplinary sanctions for women prisoners that include a prohibition of family contact, especially with children.

On occasion, a court or official will deny visitation or even telephone or video contact with children based on a stereotypical view that such visits are generally not in the best interest of the child, who may be upset by such contact.[198] Undoubtedly, institutions can make visits both more child friendly and family friendly.[199] Statutes in a few states, such as California and New York, now require dependency court judges to consider barriers to reunification of incarcerated parents and their children. For example, in California, in addition to permitting overnight visits, one of the female prisons has an enhanced child visiting center, which judges have visited. Judges have also received judicial training about child development issues that arise in the prison context in order to ensure that decisions concerning visits with children are informed by practice and theory.

Policy-Based Visiting Restrictions Under *Turner's* Discretionary Standard

Bazzetta defers to reasoned choices by correctional officials concerning visiting restrictions. Thus, administrators are not required to impose the restrictions approved by *Bazzetta,* such as the requirement that children be accompanied by a family member or legal guardian, which was upheld as reasonable to ensure that children are supervised by adults who have their best interests in mind.[200] Yet, in many cases, requiring a family member or guardian to accompany a child is tantamount to prohibiting the visit. For example, *Clemons* v. *Mitchell* relied on *Bazzetta* to dismiss a claim that a father was improperly denied a visit by his daughter, who was accompanied by the prisoner's sister, who had not been appointed her guardian.[201] The designation of additional adults by prisoners—subject to correctional approval—may accommodate more visits by children, particularly when friends, other caregivers, or nonprofit agencies may be able to transport children to a facility for visiting purposes. In this regard, The Children of Incarcerated Parents Bill of Rights[202] includes the "right to a lifelong relationship with my parent" and urges that jurisdictions focus on rehabilitation for nonviolent offenders whose children are at risk of becoming the responsibility of the state.[203] At a minimum, prison administrators should review their policies to consider the negative effect on rehabilitation caused by extreme restrictions on visiting because female inmates' ties to their children have been recognized as a strong motivation for reducing recidivism. Visiting also allows both mothers and children to better deal with their reactions to separation and loss.

Similarly, Bangkok Rule 28 provides for visits involving children to take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and that allows open contact between mother and child, and that visits involving extended contact with children should be encouraged where possible. Thus, correctional officials should consider programs for overnight visitation, particularly in locations that are far from the communities in which the families of inmates reside. An equal protection challenge to a prison policy that permitted some incarcerated mothers to have overnight visits with children but was not available to male inmates was rejected in *Bills* v. *Dahm*.[204] To the extent such programs exist, they are considered privileges, not fundamental rights. For example, *Gordon* v. *Woodbourne Correctional Facility* cited *Palmer* v. *Richards* for the proposition that "[i]t is well established that 'there is no liberty interest in participating in the Family Reunion Program,'" which permits extended visitation of family members, including children.[205]

Attempts to argue liberty interest in conjugal visits or impregnation have also not succeeded because "incarceration is simply inconsistent with the vast majority of concomitants to marriage, privacy, and personal intimacy," resulting in the abridgment of the fundamental right of familial association.[206] *Tuvalu* v. *Woodford* reviewed the cases limiting

conjugal and family rights in the context of denying a male inmate's challenge to a revised policy that denied him overnight visits with his family, including a child he had fathered while in a conjugal program in prison, and found that "even assuming the state's 'special relationship' with plaintiff requires the state to assist plaintiff in maintaining his parental role, that relationship does not extend so far as plaintiff proposes."[207] In other words, *Tuvalu* cited *Bazzetta's* reliance on the *Turner* factors and its reasoning that "[a]lternatives to visitation need not be ideal; … they need only be available."[208] Thus, the fact that the permitted visits in *Tuvalu* lacked privacy or that phone calls are expensive were not determinative.

After *Bazzetta,* visiting still remains important to ensure that children bond with their mothers, facilitates family reintegration, and encourages inmate rehabilitation. As previously mentioned, the decision does not prohibit or discourage the adoption of expansive regulations for both contact and noncontact visits. However, the scope and nature of those regulations are clearly within the discretion of the prison administrators, as long as restrictions are reasonable. Therefore, administrators should review their policies with the understanding that visiting may be the single most important factor stabilizing mental health and supporting reentry.[209] A recent 50-state survey[210] of prison visitation policies, which includes a synopsis of child visiting and extended visit policies, is a starting point for such a review; note, however, that policies vary significantly among jurisdictions.[211]

It should also be noted that not all restrictions on visitors will be upheld under *Turner.* For example, *Burgess* v. *Lowery* affirmed the trial court's denial of a defendant's qualified immunity claim in a Section 1983 action because it was clearly established that visitors have a Fourth Amendment right not to be strip-searched in the absence of a reasonable suspicion that they are carrying contraband.[212]

Chapter 7. The Effects of Child-Related Collateral Consequences on Incarcerated Mothers and Their Children

Do harsh sentencing policies combined with statutes terminating parental rights of incarcerated women violate due process or the Eighth Amendment ban on cruel and unusual punishment? In the current litigation framework, it is quite unlikely that these claims violate constitutional norms. However, from a policy perspective, they raise issues that administrators should be aware of because they affect the mental outlook of incarcerated mothers and their ability to reintegrate into the community successfully as well as the ability of their children to have meaningful relationships with their mothers. In addition, such knowledge provides valuable background that informs the interaction of administrators with the community, including faith-based organizations, to obtain additional resources for incarcerated mothers and their children. In this regard, permitting access to inmates by pro bono legal providers on family matters should also be encouraged.

The Effect of ASFA and Statutes Terminating Parental Rights

Enactment of harsh drug laws, mandatory minimums, and repeat offender statutes has resulted in more women being incarcerated for longer sentences. Although state statutes concerning the termination of parental rights vary widely, with relatively few based solely on incarceration for a stated time, the Adoption and Safe Families Act (ASFA) shortened the timeline for parental termination that existed in most states for children in foster care at the same time that sentences were lengthening. As a consequence, many nonviolent drug offenders who in the past would have been sentenced to probation or community correctional facilities now face lengthy incarceration as well as the possible loss of parental rights.[213] For female inmates with children in foster care, the timeline mandated by ASFA means that prison sentences even as short as 18 months can effectively terminate parental rights, sentencing mothers to a lifetime without their children. Termination proceedings are mandated if a child spends 15 out of 22 months in foster care, unless the child is in the care of a relative, the family has not been provided with reunification services, or a compelling reason exists as to why it is not in the best interest of the child to terminate the parental relationship. These exceptions[214] provide some flexibility to avoid termination,[215] but many women do not qualify for these exceptions. Moreover, because of the prevalence of substance abuse among female inmates, a number of children become subject to dependency court jurisdiction even prior to their mother's incarceration, commencing the termination countdown and reducing the likelihood of meeting any reunification plan within the ASFA deadline. For example, studies of incarcerated mothers in Illinois found that although incarceration was not a significant factor in initiating foster care, women whose incarceration overlapped with their child's stay in foster care were unlikely to be reunified.[216] Although ASFA did not appear to be significant in such terminations in Illinois (unlike many other states), the women being studied served very short sentences.

A number of reports and articles have condemned ASFA's effect on terminations of parental rights.[217] For example, in the 5 years after ASFA was adopted, reported cases concerning termination of parental rights increased approximately 250 percent.[218] Single mothers who are incarcerated are disproportionately affected by ASFA, in part because the majority of incarcerated women are mothers, many of whom are raising their children alone. Nationally,

more than 40 percent of state female prisoners with children reported living with them in single-parent households. These women are more likely to have their parental rights terminated than incarcerated fathers because the children of male inmates overwhelmingly reside with their natural mothers. In contrast, the children of female inmates are more likely to reside with grandparents or other family members, friends, or foster care providers. A Bureau of Justice Statistics report explains that "[m]others and fathers in state prison provided different responses about their children's current caregivers. Eighty-eight percent of fathers reported that at least one of their children was in the care of the child's mother, compared to 37% of mothers who reported the father as the child's current caregiver. Mothers in state prison most commonly identified the child's grandmother (42%) as the current caregiver. Nearly a quarter (23%) identified other relatives as the current caregivers of their children."[219] As a result, the children of female inmates are five times more likely to be placed in foster care than the children of male inmates. Another study determined that one of the most significant factors in the doubling of foster care caseloads from 1985 to 2000 was increased female incarceration.[220] However, this disparity does not fit into any current equal protection framework. Elsewhere, I have written that the growing "interface between the criminal and civil court systems may create the equivalent of a legal pincer movement, catching and separating successive generations of women and children in its midst."[221]

Although termination of parental rights is a major concern for some incarcerated mothers, *Lassiter* v. *Department of Social Services* rejected any line requirement that a state must provide a parent with an attorney in termination proceedings, instead positing a case-by-case balancing test.[222] Most states provide an attorney for the court appearance, and *In Re "A" (Children)* noted Hawaii was one of only five states that still follow a discretionary approach.[223] Even so, the difficulty for incarcerated parents in contacting social workers, child protection agencies, and others responsible for parental rights determinations can be daunting if the state only provides counsel when termination proceedings are instituted and not when dependency jurisdiction begins. Attempts to require the state to provide such legal advice, if not otherwise legislatively mandated, have not proved successful. *Glover* v. *Johnson* held that the fundamental right of access to courts did not require the state to provide legal assistance for inmates in connection with custody matters.[224] Moreover, inmates may be faced with a host of other family law issues, including custody fights, kinship or other guardianship requests, and child support orders, for which no counsel is provided. In fact, in *Turner* v. *Rogers,* the Court cited *Lassiter* when it recently adopted a balancing approach in determining whether counsel is required for indigents in civil contempt cases that could result in incarceration for failure to pay child support.[225]

In order to escape the mandates of ASFA, many advocates work on behalf of incarcerated mothers to avoid foster care placements through the use of guardianships, which also requires legal assistance. Some programs also attempt to provide services in cases where the children are at risk of foster care placements. Women's Prison Association has a number of programs[226] aimed at women offenders and their children,[227] and faith-based community programs also may provide services that assist this population.[228] Additionally, keeping children out of governmental supervision may eliminate any later attempts to recoup payment from incarcerated mothers for such services—an issue that arises with some regularity.

The ABA recently adopted Resolution 102F[229] to address family law issues of inmates. The resolution encourages bars, bar associations, and law schools to consider and expand initiatives that assist criminal defendants and prisoners in avoiding undue consequences of arrest and conviction on their custodial and parental rights.[230] Such initiatives include the following:

1. Training criminal defense counsel to ascertain whether their clients have minor children and, if so, the location of the children; and to advise clients with minor children as to the consequences of arrest and conviction on their custodial and parental rights, and on how to obtain further assistance in avoiding those consequences.

2. Developing a model for training lawyers on the collateral effects of arrest and conviction on inmates' parental rights that can be distributed to bar associations.

3. Establishing programs to provide criminal defendants and prisoners with no-cost or low-cost legal assistance on family law issues, including using kinship care and guardianship arrangements to avoid foster care placement.

Some jails and prisons already permit student legal clinics or women's bar associations to offer assistance to inmates in their facilities. Inmates' access to legal groups for family law education and representation should be encouraged by administrators, even though it is not required. Even relatively minor assistance—such as providing and notarizing forms that permit inmates to designate individuals to obtain health care or denote school placement for their children—may ensure that children receive services outside of the dependency court context. Educating inmates about the dependency process and other family law matters can also help prepare women for what to expect. Such information and assistance benefits the correctional facility by enabling women to focus more on their programming.

Per the mandates of ASFA, which became fully operative in 1999, parental termination can occur even if a child does not have a prospective family waiting to adopt him/her or has reached school age and may essentially be unadoptable.[231] Although children may remain in foster care without any real possibility of adoption, such terminations eliminates the ability of relatives to maintain family ties and prohibits their mothers from reunifying with them following their release. Ironically, upon aging out of foster care, some children locate and return to their mothers, even though their parental rights have long since been terminated.

Although ASFA and termination statutes are not unconstitutional, they affect both incarcerated mothers and their children. Typically, mothers feel guilty about disrupting their children's lives and are depressed about the potential loss of contact with their children, which may negatively affect their rehabilitation. Although the children of incarcerated mothers are not punished according to the Eighth Amendment—which applies only to prisoners—in reality, their worlds may be devastated. Children not only lose contact with their mothers but also may be separated from siblings and placed in unsatisfactory living circumstances, whether with family, friends, or in foster care. Ultimately, such children are at risk of becoming involved in the juvenile or adult correctional systems. Results from a survey of adult female prisoners who had previously been in foster care paint a grim picture of their youthful experiences, including much greater levels of sexual and physical abuse than found in the general population (87 percent of female prisoners who spent their childhood in foster care or institutions reported being physically or sexually abused).[232]

Focusing on the Effect of Incarceration on Children

Given the incredibly large number of incarcerated inmates, the past 5 years has witnessed an explosion of interest in the welfare of children of incarcerated parents.[233] The January 2012 issue of *Family Court Review* featured a symposium on children of incarcerated parents, which included an introduction, written by Southwestern Law School Professor Myrna Raeder, reviewing the literature on this topic.[234] Programs to prevent intergenerational criminality are now receiving widespread attention, but without a thorough reconsideration of the sentencing alternatives open to incarcerated mothers and the effect of incarceration on parental rights terminations and children's living conditions, mothers and children will continue to suffer penalties that are not meted out to male offenders.

Although children of incarcerated parents constitute a group that is diverse, they share many characteristics. Households headed by caregivers who have been arrested have higher levels of substance abuse, domestic violence,

and extreme poverty than other households,[235] and the children of such households experience more risk factors than other children.[236] The Centers for Disease Control and Prevention has defined parental incarceration[237] as an adverse childhood experience that can lead to a multitude of health and social problems.[238] The effect of maternal incarceration is often twofold because the fathers of these children are more likely to also be imprisoned. Not only will some children be dislodged from their homes but they may also lose their sole or primary caregiver and be separated from their siblings. In fact, one study comparing the risk to children from incarcerated mothers and incarcerated fathers found that children of incarcerated mothers were 2.5 times more likely to report that their adult children were currently imprisoned than children of incarcerated fathers and that, generally, the risk of poor outcomes intensified with maternal incarceration.[239]

In the short term, children of incarcerated parents face a decline in household income as well as an increased likelihood of poverty. They are also more likely than other children to exhibit antisocial and mental health problems, including posttraumatic stress disorder, although any link to parental imprisonment is currently unclear.[240] Stigma, humiliation, and shame are common responses to parental incarceration, which is likely why some children are lied to about the whereabouts of their absent parent. However, this does not lessen their feelings of abandonment, and often such charades are not sustainable. Indeed, some resources provide guidance about how to answer questions children are likely to ask.[241]

Current Reunification Initiatives

Several states have begun to explore how to avoid the most draconian effects of ASFA on prisoners. For example, New York has enacted what Professor Philip Genty characterizes as an ASFA Expanded Discretion Law in an article in the *Family Court Review*.[242] This law permits even women subject to lengthy incarceration to avoid termination in appropriate cases. New York also has created a more global initiative focusing on children of incarcerated parents.[243] Similarly, California has enacted a statute requiring dependency court judges to evaluate barriers to reunification posed by incarceration and to extend ASFA deadlines by 6 months, providing reunification services for up to 24 months in appropriate cases. In response, the Los Angeles County Juvenile Dependency Court convened an Incarcerated Parents Working Group, chaired by Judge Marguerite Downing.[244] In addition to likely stakeholders such as the Department of Children and Family Services, the Probation Department, service providers, and attorneys for the state, parents, and children, the monthly meetings are regularly attended by representatives from the Sheriff's Department, the California Department of Corrections and Rehabilitation (CDCR), and the warden of the California Institution for Women (CIW) as well as by Professor Raeder. The working group grapples with issues ranging from logistics to services and has organized three judicial trainings and a judicial tour of CIW to see the facilities for visiting children and to learn more about available programming relevant to reunification plans. The presence of correctional officials is essential to addressing issues such as locating and transporting parents, providing telephone access to children, and visiting. Also, the warden is helping set up a pilot project at CIW for videoconferencing dependency court hearings which, ultimately, may permit incarcerated parents to participate in hearings without the practical threat of losing their prison work or housing assignments due to lengthy absences caused by transportation delays to attend hearings in person.

CDCR's willingness to interact with the dependency court initiative on family issues may stem in part from its long-standing discussions with stakeholders generally concerned about issues affecting women offenders. The stakeholders meet semiyearly as part of a Gender-Responsive Strategies Commission convened by CDCR. This commitment to gender responsiveness in correctional policy is in line with responses to a 2000 Bureau of Prisons (BOP) survey, in which 92 percent of representatives of state correctional agencies and BOP stated that women had unique needs that should be addressed by corrections departments. Particularly, in times of budget constraints, administrators should welcome collaborative efforts that can ultimately result in obtaining more resources from the community,

which may allow them to better utilize their own resources, even if the group members represent a wide range of perspectives and organizations from outside the correctional community. Thus, officials should consider engaging in partnerships or permitting access to groups that can assist female inmates to meet the three main challenges to preventing termination of parental rights, which have been described as regular contact with a child in foster care, full participation in dependency proceedings, and access to reunification services.[245]

Such collaborative efforts may also help to identify resources to mitigate the collateral consequences of a mother's imprisonment, which may practically affect her ability to unite with her children. For instance, even if a single mother avoids termination of parental rights, she may still be denied federal cash assistance and food stamps if she lives in a state that has not opted out of the provision of the Personal Responsibility and Work Opportunity Reconciliation Act, which bars anyone with a drug-related felony conviction from receiving such aid. Because women offenders are more likely than their male counterparts to be sentenced for drug-related crimes, this provision disproportionately penalizes them and their children. An incarcerated mother also may face the lifetime 5-year limit for receiving Temporary Assistance for Needy Families or have trouble finding work if she requires drug treatment or cannot obtain child care. Additionally, a drug conviction may affect a woman's ability to obtain public housing or assistance to pay for private housing, which can be a serious barrier to family reunification.[246] Furthermore, her immigration status may result in her deportation as a result of her conviction, regardless of whether her children are citizens. Even her educational opportunities may be limited by the Higher Education Act of 1998, which denies eligibility for students convicted of drug offenses.

Welfare reform has made it even more difficult for relatives to receive funding for children in their care without a finding that the child is subject to the jurisdiction of dependency court. Yet, state involvement increases the likelihood of eventual termination, even when it avoids ASFA's timetable. Stakeholders who design programs and services for women offenders, and who impose conditions of release on women who may not be able to meet them because of child-care constraints, should fully realize and understand these legal consequences.

The ABA recently adopted Resolution 102E[247] to specifically address many of the family-related issues of female inmates discussed in this document.[248] The resolution urges expansion—as appropriate in light of security and safety concerns—of initiatives that facilitate contact and communication between parents in correctional custody and their children in the free community. Such initiatives should:

1. To the extent practicable, assign prisoners to a facility located within a reasonable distance from the prisoner's family or usual residence.

2. Encourage and support no-cost or low-cost public transportation between urban centers and prisons for families of prisoners.

3. Revise visitation rules, including those related to hours and attire, to facilitate extended contact visits between parents and their minor children, and assure that information is made available to parents regarding opportunities to visit with their children.

4. Modify visitation areas to accommodate visits by young children.

5. Provide reasonable opportunities for inmates to call and write their minor children at no cost or at the lowest possible cost.

6. Seek to reduce barriers that limit opportunities for children in foster care to visit their incarcerated parent, and make available services to help address the trauma that these children face as a result of parental incarceration.

7. Adopt or expand programs on parenting and parenting skills available to incarcerated prisoners with minor children, and provide their family members with services designed to strengthen familial relationships and child safety, permanency, and well-being outcomes.

8. Provide an opportunity for incarcerated parents to participate meaningfully in dependency-related court proceedings involving their children and ensure competent and consistent legal counsel to aid them in these cases.

In addition, to the extent possible and consistent with security, safety, and privacy concerns, the resolution urges the adoption of policies and procedures that require child welfare agencies to track the incarceration status of the parents of children in foster care and that facilitate communication between the child welfare system and the correctional system regarding the incarceration status of parents, the location of parents' correctional facilities, and subsequent transfers of parents to other correctional facilities. The resolution also urges states to clarify that incarceration alone should not be grounds for judicial termination of parental rights, and that incarceration does not negate child welfare agency requirements to provide reasonable efforts that may aid in facilitating safe, successful, and appropriate parent-child reunification. Finally, Resolution 102E urges local governments to explore the use of innovative means of providing opportunities for parent-child contact and communication, including but not limited to intergovernmental contracts and alternatives to incarceration such as privately operated residential facilities.

The discretion given to correctional officials under *Turner* makes these issues ones that correctional officials should consider when reviewing their practices and policies related to incarcerated mothers and to incarcerated fathers as well.

Conclusion

Although issues concerning prenatal care, shackling of pregnant inmates, and termination of pregnancy are most likely to generate litigation, issues concerning the relationship between female offenders and their children—whether related to visitation, reunification, or termination of parental rights—are likely to have the most day-to-day effect on the operation of female correctional facilities. The information in this document is intended to provide a resource for evaluating issues that may result in litigation and for developing policies and practices that improve the likelihood that females will successfully complete programming that facilitates their successful reintegration into the community and reunification with their minor children.

Endnotes

1. B. Bloom, B. Owen, and S. Covington, *Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders, Legal Appendix* by Professor Myrna Raeder. (Washington, DC: U.S. Department of Justice, National Institute of Corrections, 2003). NIC Accession Number 018017, *http://nicic.org/pubs/2003/018017.pdf*, accessed June 1, 2012.

2. *See* United Nations General Assembly, *The Bangkok Rules for Treatment of Women Prisoners, Rules 2.2, 58, 63, and 64* (Adopted by consensus 2010), *www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf*, accessed June 1, 2012.

3. *See, e.g.*, Robin Levi et al., "Creating the 'Bad Mother': How the U.S. Approach to Pregnancy in Prisons Violates the Right to Be a Mother," *UCLA Women's L.J.* 18: 1-77, 2010.

4. *See* Chandra Villanueva, Sarah From, and Georgia Lerner, *Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives* 30-32 (New York: Women's Prison Association, 2009), *http://wpaonline.org/pdf/Mothers%20Infants%20and%20Imprisonment%202009.pdf,* accessed June 1, 2012.

5. See *http://wpaonline.org/pdf/Mothers%20Infants%20and%20Imprisonment%202009.pdf.*

6. Villanueva, *supra* note 4.

7. *See* Mary W. Byrne, et al., "Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery," *Family Court Review* 50:77-90, 2012; Mary W. Byrne, et al., "Intergenerational Transmission Of Attachment For Infants Raised In A Prison Nursery," *Attachment and Human Development* 12:375-93 2010, *www.ncbi.nlm.nih.gov/pmc/articles/PMC2942021/*, accessed June 1, 2012.

8. *See, e.g.,* Bushey v. Butler, No. 1:12-cv-0572, 2012 WL 2130972 (S.D. W. Va. June 12, 2012) (overruling objections to Magistrate Judge's recommendation to dismiss prisoner's petition claiming she was improperly denied placement in MINT); Duarte v. City of New York, 91 A.D.3d 778, 936 N.Y.S.2d 671 (Sup. Ct., App. Div. 2d Dept. 2012) (directing inmate and her child to be admitted to a nursery program because denial of her application was arbitrary and capricious), *motion for leave to appeal granted*, 972 N.E.2d 508 (N.Y. 2012); In re Kenyetta C, No. A-11-356. 2011 WL 5986318 (Neb. App. Nov. 29, 2011) (affirming denial of placement of infant in prison nursery in favor of foster care placement because it was appropriate for state to consider mother's drug history given that she would be released within one to two years).

9. *See, e.g.*, General Assembly of the Commonwealth of Pennsylvania, *Report of the Advisory Committee: The Effects of Parental Incarceration on Children, Specifically Needs and Responsive Services, Recommendations Concerning Visiting and Communications Policies and Practices, and Parental Rights, Foster Care and Permanence*

(Harrisburg, PA: Joint State Government Commission, 2011), *http://jsg.legis.state.pa.us/resources/documents/ftp/documents/children%20of%20incarcerated%20parents.pdf*.

10. Will v. Michigan Dep't of State Police, 491 U.S. 58, 70 (1989).

11. *Id.* at 66.

12. *See, e.g.*, Kentucky v. Graham, 473 U.S. 159, 167 n. 14, (1985), ("implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State").

13. *See* Monell v. Department of Social Services, 436 U.S. 658, 690 (1978).

14. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

15. *See* Caiozzo v. Koreman, 581 F.3d 63, 71 (2d Cir. 2009), citing cases and relying on dicta in Bell v. Wolfish, 441 U.S. 520, 535 (1979).

16. *See Monell*, 436 U.S. 658.

17. *See generally* Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976).

18. *See* United States v. Sanchez, 53 M.J. 393 (2001).

19. 509 U.S. 25, 36 (1993).

20. Ashcroft v. Iqbal, 556 U.S. 662, 676-77 (2009).

21. *See* 42 U.S.C. § 1983 Claims Against Administrators and Policymakers, *infra* for examples.

22. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

23. *See generally* Alexander A. Reinert, "Does Qualified Immunity Matter?," *University of St. Thomas Law Journal* 8:477-496, 2011 (discussing legal framework and circuit variations).

24. *See* Owen v. City of Independence, 445 U.S. 622, 649–50 (1980).

25. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

26. Behrens v. Pelletier, 516 U.S. 299, 310 (1996).

27. 131 S. Ct. 884 (2011).

28. *See, e.g.*, *Behrens*, 516 U.S. at 309.

29. 446 U.S. 635, 640 (1980).

30. *See* Reinert, *supra* note 23, at 486-87.

31. *See* Saucier v. Katz, 533 U.S. 194 (2001).

32. Pearson v. Callahan, 555 U.S. 223 (2009).

33. 521 U.S. 399 (1997).

34. 534 U.S. 61 (2001).

35. 132 S. Ct. 617 (2012).

36. *See* U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, 33 U.N. Doc. CAT/C/USA/CO/2 (2006).

37. *See* Position Statement, June 12, 2012, www.midwife.org/ACNM/files/ACNMLibraryData/UPLOADFILENAME/000000000276/Anti-Shackling%20Position%20Statement%20June%202012.pdf, accessed Jan. 26, 2013.

38. See *http://www.aca.org/government/policyresolution/view.asp?ID=78.*

39. American Correctional Association, *Public Correctional Policy on Use of Restraints With Pregnant Offenders,* January, 24, 2012, *www.aca.org/government/policyresolution/view.asp?ID=78*, accessed Jan. 26, 2013.

40. *See The Bangkok Rules for Treatment of Women Prisoners, Rule 24, supra* note 2.

41. See *http://www.wpaonline.org/pdf/Shackling%20Brief_final.pdf.*

42. *See generally* Institute on Women and Criminal Justice, *Laws Banning Shackling During Childbirth Gaining Momentum Nationwide,* (New York: Women's Prison Association, 2011), *www.wpaonline.org/pdf/Shackling%20 Brief_final.pdf,* accessed June 1, 2012.

43. Elizabeth Alexander, "Unshackling Shawanna: The Battle Over Chaining Women Prisoners During Labor and Delivery," *University of Arkansas at Little Rock Law Review* 32:435-59, 2010.

44. *See generally* ACLU, *State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison – Map, www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map* which contains a comprehensive guide of each state's policies on shackling, accessed January 26, 2013 (identifying the following states as restricting shackling by statute: Arizona, California, Colorado, Florida, Hawaii, Illinois, Louisiana, Montana, Nevada, New Mexico, New York, Pennsylvania, Rhode Island, Texas, Vermont, Washington, West Virginia, with similar policies in Delaware, North Carolina, North Dakota, South Dakota).

45. *See* Jason Clayworth, "State Changes Rules for Pregnant Prisoners," Iowa City Press Citizen, Jan 25, 2013, *www.press-citizen.com/article/20130125/NEWS01/301250022/State-changes-rules-pregnant-prisoners,* accessed January 27, 2013.

46. *See, e.g.*, ACLU Reproductive Freedom Project and ACLU National Prison Project, *Preventing Shackling Of Pregnant Prisoners And Detainees: A Legislative Toolkit,* 2011, *http://womenincarcerated.org/media/legislativetoolkit.pdf;* accessed Jan. 27, 2013; SPARK Reproductive Justice NOW, *Giving Birth Behind Bars: A Guide to Achieving Reproductive Justice for Incarcerated Women* 2011, *www.sparkrj.org/wp-content/uploads/2010/01/Giving-Birth-Behind-Bars-Guide.pdf; END SHACKLING NOW!, A NOW Activist Leader's Guide to Eliminating Shackling of Incarcerated Women Pre-, During, and Post-Labor and Delivery,* Fall, 2010, *www.ncdsv.org/images/NOW_EndShaklingNow_Fall2010.pdf,* accessed Jan. 27, 2013.

47. *See, e.g.,* Nabors v. Nevada Department of Corrections, No. 12CV01044, 2012 WL 4931839 (D.Nev. June 20, 2012); Mendiola-Martinez v. Arpaio, No. 2:11CV02512, 2011 WL 9362646 (D.Ariz. Dec. 19, 2011).

48. 42 U.S.C. § 1997e(a). The PLRA also includes limitations on attorney's fees; requires prisoners proceeding *in forma pauperis* to pay the full filing fee out of a percentage of their prison trust account; requires prisoners to pay the full amount of any cost assessed against them out of their prison trust account; revokes, with limited exception, *in forma pauperis* privileges for any prisoner who has filed three or more lawsuits that fail to state a claim, or are malicious or frivolous; and requires a showing of physical injury for recovery of damages for mental or emotional injury. *Cf.* Amy Petre Hill, "Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System," *Hastings Women's Law Journal* 13: 223-259, 2002.

49. *See generally* 2003 Legal Appendix, *supra* note 1, at 116.

50. 510 F.3d 1312, 1323 (11th Cir.2007); *see generally* Jones v. Bock, 549 U.S. 199 (2007) (exhaustion is an affirmative defense; discussing inclusion of defendants who had not exhausted claims, and inmate's compliance on some but not all claims).

51. American Congress of Obstetricians and Gynecologists, *Letter in Opposition to Shackling* (Washington, DC: 2007), *www.acog.org/departments/underserved/20070612saarLTR.pdf,* accessed on June 1, 2012.

52. See http://www.ama-assn.org/resources/doc/hod/a10-resolutions.pdf.

53. American Medical Association, *Policy H-420.957, Shackling Pregnant Women in Labor* (2010),*www.ama-assn.org/resources/doc/hod/a10-resolutions.pdf,* accessed on June 1, 2012.

54. American Congress of Obstetricians and Gynecologists, *2011 ACOG District IX press release* (Washington, DC: 2011), *www.acog.org/acog_districts/dist9/20110301Release.pdf,* accessed June 1, 2012; *see generally* American Congress of Obstetricians and Gynecologists, *Committee Opinion No. 511: Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females* (Washington, DC: ACOG, 2011), *www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co511.pdf?dmc=1&ts=20120624T0145594012,* accessed June 1, 2012 (condemning shackling and listing examples of how restraints compromise health care and interfere with normal labor and delivery).

55. See http://www.acog.org/~/media/Districts/District%20IX/ShacklingPregnantInmates.pdf?dmc=1&ts=20120624T0145593992.

56. American Congress of Obstetricians and Gynecologists, *ACOG District IX, Shackling of Pregnant Inmates* (Washington, DC: ACOG, 2011), *www.acog.org/~/media/Districts/District%20IX/ShacklingPregnantInmates.pdf?dmc=1&ts=20120624T0145593992,* accessed June 1, 2012.

57. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994); *see generally* Claire Louise Griggs, "Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners," American University Journal of Gender, Social Policy and the Law, 20:247-271, 2011; *cf.* Priscilla Ocen, "Punishing Pregnancy: Race, Incarceration and the Shackling of Pregnant Prisoners," *California Law Review* 100:1-54, 2012 (arguing for a more flexible approach to Eighth Amendment analysis of shackling based on her view that this harsh practice derives from attempts to regulate and punish black women's childbirth in the historic context of slavery, convict leasing, and chain gangs).

58. *See* Villegas v. Metropolitan Government of Davidson County, 789 F.Supp.2d 895, 918-20 (M.D.Tenn. 2011); Brief of Amici Curiae National Perinatal Association, American College of Nurse Midwives, American Medical

Women's Association, Rebecca Project for Human Rights, *et al,* in Support of Appellee's Petition for Rehearing En Banc in Nelson v. Correctional Medical Services, 2008 WL 4127217; *see also* Geraldine Doetzer, "Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth," *William & Mary Journal of Women & the Law* 14:363-92, 2008; Jenni Gainsborough, "Women in Prison: International Problems and Human Rights Based Approaches to Reform," *William & Mary Journal of Women & the Law* 14:271-304, 2008; Dana Sichel, "Giving Birth in Shackles: A Constitutional and Human Rights Violation," *American University Journal of Gender, Social Policy & the Law* 16:223-55, 2008; Dana Sussman, "Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women," *Cardozo Journal of Law & Gende*r 15:477-502,2009.

59. 429 U.S. 97, 104-05 (1976).

60. *Id.,* at 105.

61. *Helling,* 509 U.S. at 33.

62. 511 U.S. 825, 842 (1994).

63. Blackmore v. Kalamazoo County, 390 F.3d 890, 897 (6th Cir. 2004); *see also* Nelson v. Correctional Medical Services, 583 F.3d 522 (8th Cir. 2009).

64. *See, e.g., Goebert,* 510 F.3d at 1327.

65. 536 U.S. 730, 738 (2002).

66. *Nelson,* 583 F.3d at 529.

67. 877 F.Supp. 634, 668-69 (D.D.C. 1994), *modified in part on other grounds,* 899 F.Supp. 659 (D.D.C. 1995).

68. *See* Women Prisoners of District of Columbia Dep't of Corr. v. District of Columbia, 93 F.3d 910, 935 (D.C. Cir. 1996), *cert. denied,* 520 U.S. 1196 (1997).

69. No. 08-4068, 2010 WL 4103755 (C.D.Ill. Oct. 18, 2010).

70. *Nelson,* 583 F.3d at 532.

71. 712 F.Supp.2d 1208 (W.D. Wash. 2010).

72. *See* Owen v. City of Independence, 445 U.S. 622, 649–50 (1980) (municipality may not assert the good faith of its officers or agents as a defense to liability).

73. 524 So.2d 182 (La. Ct. App. 1988).

74. *Villegas,* 789 F.Supp.2d. at 920.

75. Villegas v. Metropolitan Government of Nashville, No. 3:09–00219, 2012 WL 4329034 (M.D. Tenn. Sep. 20, 2012).

76. *See* Villegas v. Metropolitan Government of Nashville, No. 3:09–00219, 2012 WL 4329035 (M.D. Tenn. Sep. 20, 2012).

77. Nelson v. Turnesky, 2010 WL 3655565 (E.D. Ark. 2010).

78. *Nelson,* 583 F.3d at 535.

79. No. 08 C 6946, 2010 WL 5463065 (N.D.Ill. Dec. 29, 2010).

80. Zaborowski v. Sheriff of Cook County, No. 08 C 6946, 2011 WL 6660999 (N.D.Ill. Dec. 20, 2011).

81. 482 U.S. 78 (1987).

82. 131 S. Ct. 1910 (2011).

83. See http://www.ncchc.org/resources/statements/womenshealth2005.html.

84. National Commission on Correctional Healthcare, *Women's Health Care in Correctional Settings* (Chicago, IL: National Commission on Correctional Healthcare, Adopted 1994, Revised 2005), *www.ncchc.org/resources/statements/womenshealth2005.html*, accessed June 1, 2012.

85. *See* Fred Cohen, et al., *Practical Guide to Correctional Mental Health and the Law* (Kingston, NJ : Civic Research Institute, 2011). For a comprehensive discussion of how correctional administrators can interact with other providers of mental health and substance abuse services see the following report published by the Council of State Governments Justice Center "Adults with Behavioral Health Needs under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery" *http://consensusproject.org/documents/0000/1565/9.27.12_Behavioral_Framework_v6_full.pdf,* accessed June 1, 2012.

86. See http://www.ncjrs.gov/pdffiles1/nij/grants/220108.pdf.

87. *See* Doris J. James and Lauren E. Glaze, Mental *Health Problems of Prison and Jail Inmates September 2006*, (Bureau of Justice Statistics Special Report 2006), NCJ 213600 (Female inmates had higher rates of mental health problems than male inmates (State prisons: 73% of females and 55% of males; local jails: 75% of females and 63% of males); Allen J. Beck and Laura M. Maruschak, *Mental Health Treatment In State Prisons,* 2000 (Bureau of Justice Statistics 2001), (percentage of female state prisoners receiving psychotropic medications more than double that of men); Emily M. Wright, Patricia Van Voorhis, Ashley Bauman, and Emily Salisbury, *Gender-Responsive Risk/Needs Assessment Final Report, Prepared For The Minnesota Department Of Corrections And The Advisory Task Force On The Woman And Juvenile Female Offender In Corrections* (National Institute of Corrections/University of Cincinnati 2008), *www.uc.edu/womenoffenders/Publications%20and%20Research%20Reports.html,* accessed Jan. 26, 2013 (over 60% of women in a correctional study reported that they had received mental health treatment at some time during their lives); *see also* Henry J. Steadman, Fred C. Osher, Pamela Clark Robbins, Brian Case, & Steven Samuels, "Prevalence of Serious Mental Illness Among Jail Inmates," *Psychiatric Services* 60(6):761-65(2009); Bonita M. Veysey, "Mental Health Issues of Incarcerated Women," in *A Public Health Perspective of Women's Mental Health* 245 (Bruce Levin and Marion Becker, eds. 2010); Barbara E. Bloom and Stephanie S. Covington, "Addressing the Mental Health Needs of Women Offenders," in *Women's Mental Health Issues Across The Criminal Justice System* (Rosemary Gido and Lanette Dalley eds., 2008); Henry Steadman, Pamela Robbins, *Developing and Validating a Brief Jail Mental Health Screen for Women* (New York: National Institute of Justice, 2007) *www.ncjrs.gov/pdffiles1/nij/grants/220108.pdf*, accessed June 1, 2012.

88. See http://www.justdetention.org/pdf/PREA.pdf.

89. *See, e.g.*, P.L. 108-79, 117 Stat. 972 (2003). (rules concerning medical and mental health screening, access to emergency medical and mental health services, and ongoing medical and mental health care for sexual abuse victims and abusers), *www.justdetention.org//pdf/PREA.pdf*, accessed June 1, 2012.

90. *See, e.g.,* Branch v. City of Philadelphia Prison Health Services, Inc., No. 2:11CV01517, 2011 WL 921599 (E.D. Pa. March 3, 2011) (complaint alleging 1983 action based on inadequate policies, procedures and medical treatment resulting in miscarriage and likelihood of future high risk pregnancies); *cf.* Batts v, County of Santa Clara, No. C 08-00286 JW, 2011 WL 7109216 (N.D. Cal. March 7, 2011) (denying summary judgment concerning medical care of plaintiff's ectopic pregnancy). Similarly, in 2012, Onondaga County, New York, admitted its employees' negligence in the death of a jail inmate due to a ruptured ectopic pregnancy.

91. *See* Webb v. Jessamine County Fiscal Court, 802 F.Supp.2d 870, n.2 at 878 (E.D. Ky. 2011).

92. *Id.*

93. Cooper v. Rogers, No. 2:11-cv-964-MEE, 2012 WL 2050577, **8-9 (M.D. Ala. June 6, 2012).

94. Jennifer G. Clarke, and Eli Y. Adashi, "Perinatal Care for Incarcerated Patients," *305 JAMA 923* (March, 2011).

95. See http://jama.ama-assn.org/content/305/9/923.abstract/reply#jama_el_693.

96. *See* Carolyn B. Sufrin, and Erin Saleeby, *Readers Respond: Care at the Crossroads, Incarceration and Pregnancy* (Illinois: The Journal of the American Medical Association, 2011), *http://jama.ama-assn.org/content/305/9/923.abstract/reply#jama_el_693*, accessed June 1, 2012.

97. See http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2409166/?log$=activity.

98. *See also* Barbara A. Hotelling, "Perinatal Needs of Pregnant, Incarcerated Women," *The Journal of Perinatal Education* 17:37-44, 2008, *www.ncbi.nlm.nih.gov/pmc/articles/PMC2409166/?log$=activity*, accessed June 1, 2012.

99. See http://www.asca.net/articles/808.

100. The Rebecca Project For Human Rights, National Women's Law Center, *Mothers Behind Bars: A State-By-State Report Card And Analysis Of Federal Policies On Conditions Of Confinement For Pregnant And Parenting Women And The Effect On Their Children* (Washington, DC: National Women's Law Center, 2010), *www.asca.net/articles/808*, accessed June 1, 2012.

101. See http://www.asca.net/articles/808.

102. Association of State Correctional Administrators, *Rebecca Project Releases Report: Mother Behind Bars* (Washington, DC: National Women's Law Center, 2010), *www.asca.net/articles/808* (both the report and responses available), accessed June 1, 2012.

103. *See, e.g.,* Kendra Weatherhead, "Cruel, But Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States," *Health Matrix: Journal of Law-Medicine* 13:429-72, 2003.

104. *Goebert*, 510 F.3d at 1327-29.

105. 418 F.3d 934 (8th Cir. 2005).

106. 294 F. Supp. 2d 1003 (E.D. Wis. 2003).

107. 32 Fed. Appx. 874 (9th Cir. 2002).

108. *See, e.g.,* Boswell v. County of Sherburne, 849 F.2d 1117 (8th Cir.1988); Archer v. Dutcher, 733 F.2d 14 (2nd Cir.1984); Clifton v. Eubank, 418 F.Supp.2d 1243 (D.Colo. 2006); s*ee generally* Rachel Roth, "Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women," *UCLA Women's Law Journal* 18:79-102, 2010 (discussing pregnancy as well as barriers to abortion).

109. *See, e.g.,* Cooper v. Rogers, No. 2:11-cv-964-MEE, 2012 WL 2050577, **7-8 (M.D. Ala. June 6, 2012).

110. 802 F.Supp.2d 870, 878 (E.D. Ky. 2011) (Summary judgment and qualified immunity denied for jailer who was a certified nurse assistant where plaintiff was forced to endure labor unassisted and give birth in a cell despite jailor's knowledge that plaintiff's amniotic sac had ruptured. Summary judgment granted as to claims against governmental entities and individuals sued in their official capacities).

111. *Id.* at 880.

112. *Id.* n.6, at 881. *See also* Pope v. McComas, No. 07-cv-1191-RSM-JPD, 2011 WL 1584213 (W.D. Wash. March 10, 2011), adopted by judge at 2011 WL 1584200 (Apr. 26, 2011). In *Pope*, plaintiff gave birth to a son while unattended in her cell after a difficult delivery. The court denied summary judgment on her 1983 action and state "outrage" claim against two officers, one of whom did not believe plaintiff was pregnant and ignored her requests for assistance, while the other did not summon medical help until he heard her baby cry over the monitor. It also denied summary judgment to the Correctional Facility on plaintiff's claim that its screening policy led to the denial of adequate medical treatment, and to the County on a theory of corporate negligence based on the facility's failure to supervise persons necessary to provide health care. Similarly, summary judgment was denied to several health care employees on plaintiff's state malpractice action.

113. *See* Skinner v. State of Okl. ex rel. Williamson, 316 U.S. 535 (1942).

114. 835 F.Supp.2d 14 (W.D. Pa. 2011).

115. *See* Berrios-Berrios v. Thornburg, 716 F.Supp. 987 (E.D. Ky. 1989) (inmate was not entitled to a preliminary injunction requiring storage of breast milk and delivery to caretaker, but was entitled to a preliminary injunction allowing her to breast-feed child during regular visitation periods); Southerland v. Thigpen, 784 F.2d 713 (5th Cir. 1986) (breast-feeding would impair legitimate goals of the penal system).

116. 180 Cal.App.4th 1372, 1385, 103 Cal.Rptr.3d 834, 845-46 (Cal.App. 4 Dist. 2010).

117. *See, e.g.*, Nabors v. Nevada Department of Corrections, No. 12CV01044, 2012 WL 4931839 (D.Nev. June 20, 2012) (alleging federal and state constitutional violations as well as a state tort claim for intentional infliction of emotional distress for deprivation of medically necessary breast pump).

118. *See* Jennifer G. Clarke, et al., "Timing of Conception for Pregnant Women Returning to Jail," *Journal of Correctional Health Care* 16:133-8, 2010.

119. Kate Hannaher, "Caring for Invisible Patients: Challenges and Opportunities in Healthcare for Incarcerated Women," *Hamline Journal of Public Law & Policy* 29:161-209, 2007 (also addressing gender responsive healthcare); Kelly Parker, "Pregnant Women Inmates: Evaluating Their Rights and Identifying Opportunities for Improvements in the Treatment," *Journal of Law & Health* 19:259-95, 2004-2005 (addressing medical needs, class action litigation, and best practices); "Legal Services for Prisoners With Children," *Pregnant Women in California Prisons and Jails: A Guide for Prisoners and Legal Advocates* (3d ed. 2006), *www.prisonerswithchildren.org/pubs/*

pregnancy.pdf, accessed June. 1, 2012; Jenni Vainik, "The Reproductive and Parental Rights of Incarcerated Mothers," *Family Court Review* 46:670-94, 2008 (addressing prenatal care, shackling and prison nurseries). *Cf.* William J. Rold, "Thirty Years After Estelle v. Gamble: A Legal Retrospective," *Journal of Correctional Health Care* 14:11-20 , 2008 (discussing the right of inmates to access care, to receive the care that is ordered and to professional medical judgment).

120. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

121. *Planned Parenthood*, 505 U.S. at 877.

122. A writ of certiorari is an order given by a higher court to a lower court to allow for review in cases that would otherwise not be entitled to appeal.

123. 552 U.S. 1280 (2008), denying certiorari to Doe v. Arpaio, 150 P.3d 1258 (Ariz.App. Div. 1 2007).

124. *See* Carolyn B. Sufrin, et al., "Incarcerated Women and Abortion Provision: A Survey of Correctional Health Professionals," *Perspectives on Sexual and Reproductive Health* 41(March):6-11, 2009.

125. *See* Avalon Johnson, "Access to Elective Abortions For Female Prisoners Under The Eighth And Fourteenth Amendments," *American Journal of Law & Medicine* 37:652-683, 2011; s*ee generally* ACLU, State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison – Map, www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map which contains a comprehensive guide of each state's policies on abortion, accessed Jan. 26, 2013.

126. 834 F.2d 326 (3d Cir. 1987), *cert. denied,* 486 U.S. 1006 (1988).

127. 92 F.Supp.2d 694 (S.D. Ohio, 1999).

128. 514 F.3d 789 (8th Cir.), cert. denied, 555 U.S. 821 (2008).

129. 369 F.3d 475 (5th Cir. 2004).

130. *Id.* at 485.

131. 482 U.S. 78 (1987).

132. 543 U.S. 499 (2005).

133. Doe v. Arpaio, 150 P.3d 1258, 1266 (Ariz.App. Div. 1 2007).

134. *Victoria W,* 369 F.3d at 487.

135. 739 N.E.2d 392 (Ohio Ct. App. 2000).

136. *See* Cleveland Bar Ass'n v. Cleary, 754 N.E.2d 235, 238-39 (Ohio 2001) (discussed in April L. Cherry, "The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health," *Colum. J. Gender & L.* 16:147-197, 2007.

137. American Bar Association, *Criminal Justice Standards on the Treatment of Prisoners*, Standard 23-2 on Intake Screening (approved 2010), *www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html*, accessed June 1, 2012.

138. *See generally* Elizabeth Budnitz, "Note, Not Part of Her Sentence: Applying the Supreme Court's Johnson v. California to Prison Abortion Policies," *Brooklyn Law Review* 71:1291-1332, 2006.

139. *Roe*, 514 F.3d at 801.

140. *See* Thomas M. Blumenthal, and Kelly M. Brunie, "The Absence of Penological Rationale in the Restrictions on the Rights of Incarcerated Women," *University of Arkansas at Little Rock Law Review* 32:461-503, 2010; Mark Egerman, "Roe v. Crawford: Do Inmates Have an Eighth Amendment Right to Elective Abortions?," *Harvard Journal of Law & Gender* 31:423-44, 2008.

141. 923 F.2d 979 (2d Cir. 1991), *cert. denied,* 502 U.S. 849 (1991).

142. 926 F.2d 532 (6th Cir. 1991).

143. 830 F.Supp.2d 1295, 1302 (M.D.Fla.,2011) (the inmate was arrested after the rape and had previously taken one pill before she was incarcerated).

144. *See* Maher v. Roe, 432 U.S. 464, 474 (1977); Harris v. McRae, 448 U.S. 297, 316 (1980); Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Rust v. Sullivan, 500 U.S. 173, 178 (1991).

145. See http://www.bop.gov/news/PDFs/legal_guide.pdf.

146. *See* Federal Bureau of Prisons, *28 C.F.R. § 551.23; Legal Resource Guide to the Federal Bureau of Prisons, pp. 22* (U.S. Department of Justice, 2008), *www.bop.gov/news/PDFs/legal_guide.pdf*, accessed June 1, 2012.

147. Claire Deason, "Note, Unexpected Consequences: The Constitutional Implications of Federal Prison Policy for Offenders Considering Abortion," *Minnesota Law Review* 93:1377-1409, 2009.

148. *See* R.W. v. Spinelli, No. 8:11–CV–1326–EAK–AEP, 2012 WL 2190835 (M.D.Fla. June 14, 2012) (rejecting a Rule 12(b)(6) motion to dismiss against the medical employee who refused to give pill on moral grounds and finding that she and the sheriff were final policy makers in the context of decisions regarding dispensing anti-contraceptive medication at the jail; the equal protection claim was based on the allegation that the employee had allowed a male seeking a gender change to take the same medication previously).

149. *See* Christopher J. Mumola, *Incarcerated Parents and Their Children* (Washington, DC: U.S. Dept. of Justice, Bureau of Justice Statistics, 2000), *http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf*, accessed June 1, 2012.

150. 866 F.2d 1450 (D.C. Cir. 1989).

151. *See, e.g.,* United States v. Virginia, 518 U.S. 515, 533 (1996).

152. No. 88-5058, 2003 WL 21384601 (D.C. Cir. May 28, 2003) *rehearing en banc denied*, Jun 24, 2003.

153. *See* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977).

154. 427 U.S. 215, 225 (1976).

155. 461 U.S. 238, 24546 (1983).

156. 590 F.Supp.2d 101 (D.D.C. 2008).

157. 196 F.3d 800 (7th Cir. 1999).

158. *See generally* Chesa Boudin, "Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship," *The Journal of Criminal Law & Criminology* 101:77-118, 2011 (arguing that the children have constitutional rights to visit and maintain contact that are currently ignored when the courts focus on prisoners).

159. Foreverfamily, Inc., "For Our Families," *www.foreverfam.org/families.php*, accessed June 1, 2012; Get On The Bus, "Uniting children with their mothers and fathers in prison," *www.getonthebus.us/*, accessed June 1, 2012.

160. *See, e.g.*, Dr. Susan Sharp, and Emily Pain, *No Sympathy: Study of Incarcerated Women And Their Children*, (Oklahoma: Oklahoma Commission on Children and Youth, pp. 35, Jan. 2010), *http://digitalprairie.ok.gov/cdm/singleitem/collection/stgovpub/id/14113/rec/2*, accessed June 26, 2012.

161. Dr Lorana Bartels, and Antonette Gaffney, *Good Practice in Women's Prisons: A Literature Review*, (Australia: Australian Government, Australian Institute of Criminology, AIC Reports Technical and Background Paper 41, pp. 5, 2011), *www.aic.gov.au/documents/4/E/5/%7B4E5E4435-E70A-44DB-8449,3154E6BD81EB%7Dtbp041_002.pdf*, accessed June 1, 2012.

162. *Id.* at 13.

163. *Id.* at 67.

164. Dr. Denise Johnston, "Services for Children of Incarcerated Parents," *Family Court Review* 50:91-105, 2012.

165. *See* Creasie Finney Hairston, *Focus on Children with Incarcerated Parents: An Overview of the Research Literature* 26 (Maryland: The Annie E. Casey Foundation, 2007), *www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid={F48C4DF8-BBD9-4915-85D7-53EAFC941189}*, accessed June 1, 2012.

166. Jade S. Laughlin, et al., "Incarcerated Mothers and Child Visitation: A Law, Social Science, and Policy Perspective," *Criminal Justice Policy Review* 19(June):215-238, 2008 (visitation impacts recidivism reduction, promotes family reunification post-release, and makes positive community reentry possible).

167. *See generally* Erin McGrath, "Reentry Courts: Reducing Recidivism Among Incarcerated Mothers to Help Increase Reunification with Their Children," *Family Court Review* 50:113-27, 2012.

168. *See* Brown v. Plata, 131 S. Ct. 1910 (2011).

169. *See* California Department of Corrections and Rehabilitation, *Overview: AB 109 and AB 117*, (California: State of California, 2011), *www.cdcr.ca.gov/realignment/docs/AB_109-PowerPoint-Overview.pdf*, accessed June 1, 2012.

170. *See* California Department of Corrections and Rehabilitation, *Alternative Custody Program Fact Sheet*, (California: State of California, 2011), *www.cdcr.ca.gov/Adult_Operations/FOPS/docs/ACP-Fact-Sheet-Final.pdf*, accessed June 1, 2012.

171. *See* Emily A Whitehurst, "Shaping California's Prisons: How the Alternative Custody Program, Designed to Remedy the State's Eighth Amendment Violations in the Prison System, Encroaches on Equal Protection," *Wm. & Mary Bill Rts. J.* 21:303-332 (noting that the text of the statute meets equal protection concerns, but its implementation does not).

172. 468 U.S. 576 (1984).

173. *Id.* at 589.

174. 490 U.S. 454, 460-61(1989).

175. *Id.* at 465.

176. 539 U.S. 126, 131-132 (2003).

177. *Id.* at 131.

178. 474 F.Supp. 294, 295 (D.N.J. 1979).

179. *Id.* at 302.

180. American Bar Association, Criminal Justice Standards on the Treatment of Prisoners, Standard 23-8.5 on Visiting (approved 2010), *www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html*, accessed Jan. 27, 2013.

181. *See* Elena Hontoria Tuerk, and Ann Booker Loper, "Contact Between Incarcerated Mothers and their Children: Assessing Parental Stress," *Journal Of Offender Rehabilitation* 43:23-43, 2006.

182. *See* Lauren E. Glaze, and Laura M. Maruschak, *Parents in Prison and Their Minor Children* 5 (U.S. Department of Justice, Bureau of Justice Statistics, NCJ 222984, 2008), *www.ojp.usdoj.gov/bjs/pub/pdf/pptmc.pdf,* accessed June 1, 2012.

183. Marilyn C. Moses, "Correlating Incarcerated Mothers, Foster Care and Mother-Child Reunification," *Corrections Today Magazine* 68:98-100, 2006.

184. *See* Danielle H. Dallaire, "Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families," *Family Relations* 56:440-53, 2007.

185. *Bazzetta*, 539 U.S. at 137.

186. 175 Fed. Appx. 746, 747 (7th Cir. 2006).

187. 369 Fed. Appx. 532 (5th Cir. 2010).

188. 360 F.3d 1191 (10th Cir. 2004); *Accord*, Mitchell v. Smith, 817 N.W.2d 742(Minn. 2012); Stojanovic v. Humphreys, 309 Fed. Appx. 48 (7th Cir. 2009).

189. 360 F.3d at 1198 (citations shortened).

190. 430 F.3d 795, 802-03 (6th Cir. 2005).

191. 2010 WL 2992382 (W.D. Mich. 2010).

192. 542 F.Supp.2d 703, 721 (E.D. Mich. 2008).

193. *Id.* at 727-28.

194. 272 F.Supp.2d 223 (W.D. N.Y. 2003).

195. 320 F.3d 844 (8th Cir. 2003).

196. 621 F.3d 1196 (9th Cir. 2010).

197. *See, e.g.*, Megan McMillen, "I Need to Feel Your Touch: Allowing Newborns and Infants Contact Visitation with Jailed Parents," *Univ. Ill. L. Rev.* 2012:1811-1853, 2012 (arguing for contact visits in jails, noting that in contrast to jails which frequently prohibit contact visits, many prisons allow contact visits with children and enhanced visiting arrangements).

198. *See, e.g.*, L.F. v. S.T.C., N. FV-21-0437-09, 2012 WL 5499880 (N.J.Super.A.D. Nov. 14, 2012) (father denied telephonic and monthly video conferences with his young children).

199. *See, e.g.*, J. Poehlmann, et al., "Children's Contact with Their Incarcerated Parents: Research Findings and Recommendations." *American Psychologist*, 65 (6), 575-598, 2010 (recommending preparing children for visits, open communication during face to face visits, promoting parent child contact between visits and promoting video visitation).

200. *Cf.* Mills v. Fischer, No. 11–276, 2012 WL 4215891 (2d Cir. Sept. 21, 2012) (denial of single visit in violation of state law or regulation where birth certificate of child was presented did not state a 1983 claim for relief; even if prisoner had First Amendment right to visit it was subject to regulation and no malice was alleged; there was also no due process claim since denial of single visit was not an atypical and significant hardship).

201. 2011 WL 5839659 (N.D.Cal. 2011).

202. See http://www.sfcipp.org/.

203. San Francisco Children of Incarcerated Parents, *A Bill of Rights*, *www.sfcipp.org*, accessed June 1, 2012.

204. 32 F.3d 333 (8th Cir. 1994).

205. 4481 F. Supp. 2d 263, 271 (S.D.N.Y. 2007) *citing* Palmer v. Richards, 364 F.3d 60, n.2 at 64 (2d Cir. 2004); *see also* Macedon v. California Department of Corrections, 67 Fed. Appx. 407 (9th Cir. 2003) (denial of family visits did not violate any liberty interest).

206. *See* Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002); *see also* Goodwin v. Turner, 908 F.2d 1395, 1399 (8th Cir. 1990).

207. No. CIV S-04-1724, 2008 WL 619158, at 7 (E.D. Cal. 2008).

208. *Bazzetta*, 539 U.S. at 135.

209. *See generally* Jade S. Laughlin, et al., "Incarcerated Mothers and Child Visitation: A Law, Social Science, and Policy Perspective," *Criminal Justice Policy Review* 19:215-38, 2008; *cf.* Sarah Abramowicz, "Rethinking Parental Incarceration," *University of Colorado Law Review* 82:795-874, 2011.

210. See http://www.asca.net/system/assets/attachments/4992/YLS%20Prison%20Visitation%20Survey%20Memo%20Oct%202012%20DRAFT.pdf?1350743374.

211. Chesa Boudin, Trevor Stutz, and Aaron Littman. *Prison Visitation Policies: A Fifty State Survey October 2012*.

212. 201 F.3d 942, (7th Cir.), *cert. denied,* 531 U.S. 817 (2000).

213. *See generally* Myrna S. Raeder, "Gender-Related Issues in a Post-Booker Federal Guidelines World," *McGeorge Law Review* 37: 691-756, 2006; Myrna S. Raeder, "A Primer on Gender-Related Issues That Affect Female Offenders," *Criminal Justice* 20:4-30 , 2005.

214. See http://www.nationalreentryresourcecenter.org/documents/0000/1060/Reentry_Council_Mythbuster_Parental_Rights.pdf.

215. *See* Federal Interagency Reentry Council, *Reentry Myth Buster! On Parental Rights* (New York: Justice Center, The Council of State Governments, 2008), *www.nationalreentryresourcecenter.org/documents/0000/1060/Reentry_Council_Mythbuster_Parental_Rights.pdf*, accessed June 1, 2012.

216. *See* Susan George, et al., *Incarcerated Women, Their Children, and the Nexus with Foster Care*, (Washington, DC: National Criminal Justice Reference Service, Final Report at 9, 2007), *www.ncjrs.gov/pdffiles1/nij/grants/234110.pdf*, accessed June 1, 2012.

217. *See, e.g.,* Arlene F. Lee, et al., *The IMPACT of the Adoption and Safe Families Act on Children of Incarcerated Parents* (Washington, DC: Child Welfare League of America, 2005), *www.fcnetwork.org/Resource%20Center/cop_pubimpact.pdf,* accessed June 1, 2012; Raquel Ellis, *et al., The Timing Of Termination Of Parental Rights: A Balancing Act For Children's Best Interests*, (Washington, DC: Child Trends, Sep. 2009), *www.childtrends.org/Files/Child_Trends-2009_09_09_RB_LegalOrphans.pdf*, accessed June 1, 2012; Deseriee A. Kennedy, "Children, Parents & The State: The Construction Of A New Family Ideology." *Berkeley Journal of Gender Law & Justice* 26: 78-138, 2011; Martha L. Raimon, et al., "Sometimes Good Intentions Yield Bad Results: ASFA's Effect on Incarcerated Parents and Their Children," in *Intentions and Results: A Look Back at the Adoption and Safe Families Act* (Urban Institute, and Center for the Study of Social Policy, 2009); Stephanie Sherry, "Note, When Jail Fails: Amending the ASFA to Reduce its Negative Impact on Children of Incarcerated Parents," *Family Court Review* 48:380-93, 2010. *See also* Charlene Wear Simmons, and Emily Danker-Feldman, "Parental Incarceration, Termination of Parental Rights and Adoption: A Case Study of the Intersection Between the Child Welfare and Criminal Justice Systems," *Justice Policy Journal No. 2 7*: 2010, *www.cjcj.org/files/Parental_Incarceration.pdf,* accessed June 1, 2012.

218. *See* Philip M. Genty, "Damage to Family Relationships as a Collateral Consequence of Parental Incarceration," *Fordham Urban Law Journal* 30:1671-84, 2003.

219. *See* Lauren E. Glaze, and Laura M. Maruschak, *Parents in Prison and Their Minor Children 5* (U.S. Department of Justice, Bureau of Justice Statistics, NCJ 222984, 2008), *www.ojp.usdoj.gov/bjs/pub/pdf/pptmc.pdf*, accessed June 1, 2012.

220. Christopher A. Swann, and Michelle Sheran Sylvester, "The Foster Care Crisis: What Caused Caseloads to Grow?" *Demography* 43(May):309-35, 2006.

221. Myrna Raeder, and Leslie Acoca, "Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children," *Stanford Law & Policy Review* 11: 133-44, 1999.

222. Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981).

223. In re "A" Children, 193 P.3d 1228 (Hawaii App. 2008).

224. Glover v. Johnson, 75 F.3d 264 (6th Cir.), *cert. denied*, 519 U.S. 816 (1996).

225. Turner v. Rogers, 131 S.Ct. 2507 (2011).

226. See http://www.wpaonline.org/.

227. Women's Prison Association, "WPA," *www.wpaonline.org*, accessed June 1, 2012; *see also* Chicago Legal Advocacy for Incarcerated Mothers, "CLAIM," *www.claim-il.org/*, accessed June 1, 2012; and Legal Services for Prisoners with Children, "Who We Are," *www.prisonerswithchildren.org*, accessed June1, 2012.

228. *See, e.g.*, Volunteers of America, *Childhood Disrupted: Understanding the Features and Effects of Maternal Incarceration*, November 2010, *www.voa.org/Childhood-Disrupted-Report.*

229. See http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102f.authcheckdam.pdf.

230. American Bar Association Criminal Justice Section, *Report to the House of Delegates*, (recommendation approved 2009), *www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102f.authcheckdam.pdf*, accessed June 1, 2012.

231. *See, e.g.*, Amy Wilkinson-Hagen, "Note: The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights," *Georgetown Journal on Poverty Law & Policy* 11:137-168, 2004; Megan K. Holbrook, "Note: The Wrong Side of the Coin–Policy, Permanency and the Problem of Legal Orphans in Wyoming; In re A.D., D.D., K.D. v. Wyoming Department of Family Services, 151 P.3d 1102 (Wyo. 2007)," *Wyoming Law Review* 8:139-163, 2008.

232. Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers* 2 (Washington, DC: Department of Justice, Bureau of Statistics, NCJ 172879, 1999) (eighty-seven percent of female prisoners who spent their childhood in foster care or institutions reported being physically or sexually abused), *www.bjs.gov/content/pub/pdf/parip.pdf*, accessed June 1, 2012.

233.*See, e.g.*, J. Mark Eddy, and Julie Poehlmann, *Children of Incarcerated Parents: A Handbook for Researchers and Practitioners* (Urban Institute Press, 1 edition, 2010); Yvette Harris, James A. Graham, and Gloria Jean Carpenter, *Children of Incarcerated Parents, Theoretical, Developmental and Clinical Issues* (Springer Publishing Company, 1 edition, 2010).

234. Myrna S. Raeder, "Special Issue: Making a Better World for Children of Incarcerated Parents," *Family Court Review,* 50 (1):23-35 (2012).

235. Susan D. Phillips, and Alan J. Dettlaff, "More than Parents in Prison: The Broader Overlap Between the Criminal Justice and Child Welfare Systems," *Journal of Public Child Welfare* 3:3-22, 2009.

236. *See, e.g.,* Susan D. Phillips, and James P. Gleeson, *What we Know Now that We Didn't Know Then about the Criminal Justice System's Involvement in Families with whom Child Welfare Agencies have Contact: Findings from a Landmark National Study,* (Center for Social Policy and Research, University of Illinois at Chicago, July 2007), *www.fcnetwork.org/reading/what_we_know_now.pdf,* accessed June 1, 2012; Jessica Nickel, *et al., Children of Incarcerated Parents: An Action Plan for Federal Policymakers* 1 (New York: Council of State Governments Justice Center, 2009), *www.reentrypolicy.org/jc_publications/federal_action_plan_/Children_Incarcerated_Parents_v8.pdf,* accessed June 1, 2012.

237. See http://www.cdc.gov/ace/prevalence.htm#ACED.

238. *See* Center for Disease Control and Prevention, "Adverse Childhood Experiences (Ace) Study," *www.cdc.gov/ace/prevalence.htm#ACED,* accessed June 1, 2012.

239. Danielle H. Dallaire, "Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families," *Family Relations* 56: 440-53, 2007.

240. Joseph Murray, et al., "Effects of Parental Imprisonment on Child Antisocial Behaviour and Mental Health: A Systematic Review," *Campbell Systematic Reviews* 4: 3-105, 2009, *www.ncjrs.gov/pdffiles1/nij/grants/229378.pdf;* accessed June 1, 2012; *see also* Julie Poehlmann, "Children of Incarcerated Mothers and Fathers," *Wisconsin Journal of Law Gender & Society* 24:331-40, 2009.

241. *See, e.g.,* MAFTI, *Family Members Behind Bars, Difficult Questions Children Ask ...And Answers That Might Help,* (Montana: Montana Alliance of Families Touched by Incarceration, 2009), *www.f2f.ca.gov/res/pdf/FamilyMembersBehindBars.pdf,* accessed June 1, 2012.

242. Philip M. Genty, "Moving Beyond Generalizations And Stereotypes To Develop Individualized Approaches For Working With Families Affected By Parental Incarceration" *Family Court Review* 50:36-47, 2012.

243. *See* Tanya Krupat, Elizabeth Gaynes, and Yali Lincroft, *A Call to Action: Safeguarding New York's Children of Incarcerated Parents* (New York: The Osborne Association, 2011), *www.osborneny.org/NYCIP/ACalltoActionNYCIP.Osborne2011.pdf,* accessed June 1, 2012.

244. *See* Honorable Marguerite Downing, "Barriers to Reunification for Incarcerated Parent-A Judicial Perspective," *Family Court Review,* 50:71-76, 2012.

245. *See* Steve Christian, *Children of Incarcerated Parents* (Washington, DC: National Conference of State Legislatures, 2009), *www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf,* accessed June 1, 2012.

246. *See* Katherine Cortes, and Shawn Rogers, *Reentry Housing Options: The Policymakers' Guide* (New York: The Council of State Governments Justice Center, 2010), *http://reentrypolicy.org/jc_publications/reentry-housing-options,* accessed June 1, 2012.

247. See http://www.abanow.org/wordpress/wp-content/themes/ABANow/wp-content/uploads/resolution-pdfs/MY2010/summaries/102E-adopted.pdf.

248. American Bar Association Criminal Justice Section, *Report to the House of Delegates* (recommendation approved 2009), *www.abanow.org/wordpress/wp-content/themes/ABANow/wp-content/uploads/resolution-pdfs/MY2010/summaries/102E-adopted.pdf,* accessed June 1, 2012.

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